Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1995

DANIEL J. POSNER, A MINOR,
BY HIS PARENT, LOUIS J. POSNER,

Petitioner,

-against-

CENTRAL SYNAGOGUE, CENTRAL SYNAGOGUE NURSERY SCHOOL, AND MARY SOLOW, AS DIRECTOR OF CENTRAL SYNAGOGUE NURSERY SCHOOL,

Respondents,

-and-

THE UNITED STATES OF AMERICA,

Respondent-Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant certiorari to resolve an important question of federal law, to wit, whether the religious exemption of Title III of the Americans with Disabilities Act (ADA) is an unconstitutional violation of the Establishment Clause in the case of refusal by a day care center affiliated with a religious institution to make reasonable modification to its practices and policies to accommodate a child with a disability?

2. Should this Court grant certiorari to resolve an important question of federal law, to wit, whether violation of the civil rights of a pre-school child with a disability by a private, state licensed day care center which accepted the State's delegation of its federally mandated obligation to educate pre-school children with disabilities in inclusive educational settings constitute "state action" under Section 1983?

3. Should this Court grant certiorari to exercise its power of supervision where the Court of Appeals invoked collateral estoppel of a State Court Order where collateral estoppel was never raised as an affirmative defense in the District Court proceedings, and sanctioned the State Court which applied a clearly erroneous legal standard for disability discrimination and where plaintiff did not have a full and fair opportunity to litigate his claim?

PARTIES TO THE PROCEEDING

The Parties to the proceeding in the United States Court of Appeals for the Second Circuit were:

Petitioner, Daniel J. Posner, a disabled child, by his father, Louis J. Posner, Esq.;

Respondents, Central Synagogue, a not-for-profit religious corporation, Central Synagogue Nursery School, a state licensed, private day care center, and Mary Solow, the Director of Central Synagogue Nursery School; and

Respondent-Intervenor, the United States of America, in response to the District Court's Certificate and Order of Constitutional Challenge.

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NO.

In the

SUPREME COURT OF THE UNITED STATES

October, 1995 Term

DANIEL J. POSNER, a Minor, by his Parent, LOUIS J. POSNER,
Petitioner,

-v-

CENTRAL SYNAGOGUE, CENTRAL SYNAGOGUE NURSERY SCHOOL, AND MARY SOLOW, as Director of CENTRAL SYNAGOGUE NURSERY SCHOOL,
Respondents,

-and-

THE UNITED STATES OF AMERICA,
Respondent-Intervenor

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit affirmed a decision of the United States District Court for the Southern District of New York in an unpublished Summary Order and Judgement filed on May 30, 1995, which is set forth in the

Appendix at page a1. Thereafter, by order dated August 29, 1995, the Court of Appeals denied petitioner's petition for a rehearing with a suggestion of rehearing in banc, which is set forth in the Appendix at page a23.

Petitioner Daniel J. Posner, a disabled child, by his parent Louis J. Posner ("Daniel") appealed to the Court of Appeals from an order and judgment of the Honorable Leonard B. Sand, Judge of the United States District Court for the Southern District of New York filed September 21, 1994. Judge Sand granted defendants' motion for summary judgment, made pursuant to Fed. R. Civ. P. 56, and dismissed the complaint. A copy of the District Court's Order and Judgment and Opinion are set forth in the Appendix at page a11.

A. State Court Opinions.

On October 12, 1993, Acting State Supreme Court Justice Burton S. Sherman denied Plaintiffs' Louis J. Posner and Daniel J. Posner, a minor, motion pursuant to New York CPLR sections 325(a),(b) and 3025(b). A copy of the State Supreme Court decision is set forth in the Appendix at page a29.

On March 17, 1994, the State Supreme Court decision was affirmed by the Appellate Division, First Department in Posner v. Central Synagogue, 202 A.D.2d 284, 609 N.Y.S.2d 195 (1st Dep't). A copy of the State Appellate Division decision is set forth in the Appendix at page a25.

On June 16, 1994, the Court of Appeals of the State of New York denied plaintiffs' motion for leave to appeal. leave to appeal denied, 83 N.Y.2d 953, 615 N.Y.S.2d 878 (1994). A copy of the Court of Appeals decision is set forth in the Appendix at page a34.

GROUNDS FOR THIS COURT'S JURISDICTION

Jurisdiction in the District Court was based upon alleged violations of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, et seq. (the "ADA") and the Civil Rights Act, 42 U.S.C. § 1983.

The Order and Judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on May 30, 1995. The Order denying rehearing was entered on August 29, 1995. This Court has jurisdiction in this case pursuant to 28 U.S.C. § 1254(1). The Second Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

The notifications to the Solicitor General of the United States and the Attorney General have been made pursuant to Rule 29.4(b) of this Court. An Order and Certificate of Constitutional Challenge issued by the District Court on December 2, 1993 is set forth in the Appendix at page a21.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves the Full Faith and Credit clause of Article Four, Section One, the Establishment Clause of the First

Amendment, and the Privileges and Immunities and Due Process Clauses of the Fourteenth Amendment, Section One, to the United States Constitution, 20 U.S.C.S. 1401(a), the Full Faith and Credit Clause of 28 U.S.C. § 1738, the Civil Rights Act, 42. U.S.C. § 1983, 42 U.S.C. § 12181 (7)(J),(K), 42 U.S.C. § 12182 (b)(2)(A)(ii),(iii) and 42 U.S.C. § 12187 of Title III of the Americans with Disabilities Act of 1990, 34 CFR Sec. 300.550, Article 89 of the Consolidated Laws, Commissioner's Regulation, Part 200.15(a), N.Y. Exec. Law § 296(4) and Part 418.4(c)(25) of the New York State Social Services Law, all of which are set forth as follows:

U. S. Constitution, Article IV, Section 1

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State...

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...

U. S. Constitution, Amendment XIV, Section I

> ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any state

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

20 U.S.C. § 1401(a), Education of the Handicapped Act

(1)(A) The term "children with disabilities" means children (i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, need special and related services.

(B) The term "children with disabilities" for children aged 3 to 5, inclusive, may, at the State's discretion, include children --

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(ii) who, by reason thereof, need special education and related services.

28 U.S.C. § 1738, Full Faith & Credit Clause

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C. § 12181(7)(J),(K)

(7) Public Accommodation - The following private entities are considered public accommodations for purposes of this title if the operations of such entities affect commence-

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment;

42 U.S.C. § 12182 (b)(2)(A)(ii), (iii)

(A) Discrimination - For purposes of subsection (a), discrimination includes -

(ii) a failure to make reasonable modification in policies, practices or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modification would fundamentally alter the nature of such goods, services facilities, privileges, advantages, or accommodations.

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

42 U.S.C. § 12187

EXEMPTIONS FOR PRIVATE CLUBS AND RELIGIOUS ORGANIZATIONS.

The provisions of this title shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000-a(e)) or to religious organizations or entities controlled by religious organizations, including places of worship.

34 CFR Ch. III, § 300.550, [Assistance to States For Education of Handicapped Children]

LEAST RESTRICTIVE ENVIRONMENT

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 300.550-300.556

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

New York Consolidated Laws, Article 89, § 4410(4) [Special Education Services and Programs for Preschool Children with Handicapping Conditions]

EVALUATIONS

a. The board shall identify each preschool child thought to have a handicapping condition who resides within the district and, with the consent of the parent, provide for an evaluation. The board shall make such identification in accordance with regulations of the commissioner.

b. Each board shall, within time limits established by the commissioner, be responsible for providing the parent of a preschool child suspected of having a handicapping condition with a list of approved evaluators in the geographic area. The parent may select the evaluator from such list. Each board shall provide for dissemination of the list and other information to parents at appropriate sites including but not limited to pre-kindergarten, day care, head start programs and early childhood direction centers, pursuant to regulations of the commissioner.

c. Each evaluation shall include a detailed statement of the preschool child's individual educational needs, if any. For those children determined to have handicapping conditions, the evaluation shall also include a recommendation as

to the frequency and duration of services that should be provided and shall address the manner in which the preschool child can be provided with instruction in the least restrictive environment. Nothing shall prohibit an approved evaluator from reviewing other assessments or evaluations to determine if such assessment or evaluation fulfill the requirements of the regulations of the commissioner.

New York State Commissioner's Regulations, Part 200.16(a) [Educational Programs for Preschool Children with Handicapping Conditions]

(a) Eligibility. A preschool child with a handicapping condition shall be eligible for special education programs and services pursuant to section 4410 of the Education Law provided that the child has a handicapping condition as defined in paragraphs (1) through (11) of section 200.1(ff) of this Part.

N.Y. Exec Law § 296(4) [Human Rights Law]

It shall be an unlawful discriminatory practice for an education corporation or association which holds itself out to the public to be nonsectarian and exempt from taxation pursuant to the provisions of article four of the real property tax law to deny the

use of its facilities to any person otherwise qualified, by reason of race, color, religion, disability, national origin, age or marital status.

18 NYCRR Part 418.4(c)(25) [Social Services Law]

a child day car center or small day care center may not refuse to admit a disabled child who otherwise is eligible for admission if a space is available, the child could benefit from participation in the program and reasonable modifications can be made in the premises and/or program to accommodate the child. Each disabled child must be evaluated by the provider to determine if the child could be accommodated in the program if reasonable modifications are made to the premises and/or program. Nothing contained in this paragraph shall be deemed to require the provider to incur significant additional expenses to modify the premises and/or program to accommodate such a child....

STATEMENT OF THE CASE

Introduction

The jurisdiction of the District Court of the Southern District of New York was based on violations of the Civil Rights

Act, 42 U.S.C. § 1983 and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq., in the discrimination by respondent, a private, state licensed, religious affiliated day care center against petitioner, a pre-school child with a disability. Discriminatory conduct directed against disabled children is widespread, but has only been recently brought to the attention of the Courts and the media.[1] Respondents' discriminatory conduct culminated in Daniel's involuntary withdrawal from the nursery school after only 10 days in violation of Daniel's federally mandated right to be educated in the "least restrictive" environment. This case addresses a serious and very important social issue concerning the discrimination faced by a pre-school disabled child seeking to be educated in a an inclusive educational environment with his nondisabled peers.

Approximately ten percent of the school age population suffer from some sort of disability, including physical disabilities, mental retardation, learning disabilities, communication disorders and attentional deficit hyperactivity disorders. At the pre-school level, children with disabilities must rely on the private sector to obtain the federally mandated inclusive education. This private sector consists primarily of schools which are affiliated or controlled by religious institutions.

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[1] "A private school in Alexandria, facing a lawsuit alleging discrimination against a child with a learning disability, is returning all of its federal funding rather than enroll the student in its first grade. The Washington Post," Va. School To Return U.S. Funds; Discrimination Suit Results in Decision, Metro Section, Page 1, by Steve Bates, July 13, 1994.

In Manhattan's east side it is standard practice for pre-schools to discriminate against children with disabilities. These private schools use personal interviews and the Educational Records Bureau exam to help identify and exclude children with disabilities. Typical tactics used in discriminating against disabled children include requiring a working mother to attend the school when she is really not needed, ignoring the child, "setting up" the child for failure, refusing to allow special education teachers to meet with the child, and placing blame on the disabled child and his parents. This long-standing policy of discriminating against disabled children is sanctioned at the highest levels of these institutions and is supported by its parents and members, such as Martin R. Gold, Esq., who want to retain an air of exclusivity in their pre-schools.

Statement of Facts:

A. Daniel is a Child with a Disability Whose Communication and Attentional Deficit Disorders Impair His Ability to Understand Language and Require Reasonable Modification to Ensure His Safety.

Petitioner Daniel J. Posner ("Daniel") is a child with a disability. Daniel was evaluated by a number of professionals who confirmed that Daniel has a receptive and expressive speech/language disorder, along with a co-existing attentional deficit disorder. Daniel's communication disability impairs both his ability to speak and his ability to understand language. The attentional deficit disorder is a learning disorder which impairs his

ability to concentrate and follow directions. Notwithstanding Daniel's disabilities, in certain areas of cognitive abilities, Daniel, like his father Louis J. Posner, Esq., CPA ("Posner"), a member of Mensa, scores at the 99th percentile.

In February, 1992, Dr. Steven H. Blaustein, a Speech and Language Pathologist, conducted a speech and language evaluation of Daniel concluding that Daniel "is experiencing a marked delay in the acquisition of speech and language skills. This delay is characterized by a phonological disorder and a coexisting language disorder". (emphasis added) Daniel's pediatrician, John G. Larsen, M.D., of Uptown Pediatrics, P.C., 1175 Park Avenue, New York City, reported that Daniel has "a speech and language disorder. This is caused by central nervous system dysfunction and is not a minor variation of normal development." (emphasis added). Wendy Teppler, M.A., CCC, Director of Speech and Language Services, Marymount Manhattan College, conducted a speech evaluation of Daniel which revealed a moderate phonological disorder. Daniel was evaluated by Dr. Francine Leof, a child psychologist, who concluded that Daniel has a "language disorder."

Daniel's disabilities are more pervasive than just speech and language. Child Psychologist, Francine Loef, Psy. D., reported that Daniel's "language disorder which is clearly impacting on his cognitive development at this time. In addition, he has serious attentional deficits, difficulty modulating his behavior...". Barbara Goldfarb, M.A., CCC-SLP, Speech-Language Pathologist, Communication and Learning Center of Marymount Manhattan College, reported that "Danny is a quiet, happy, energetic child

who...frequently disengaged from classroom activities. In these instances he would remain along the periphery of the room...Cognitively, Danny's attention span increased for highly structured tasks. Daniel's psychological profiles indicate a co-existing attentional deficit disorder or that the speech/language neurological disabilities manifest many of the same characteristics as ADD.[2]

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[2] "ADD [Attentional Deficit Disorder or ADHD (attentional deficit hyperactivity disorder)] is a neurological syndrome whose classic defining triad of symptoms include impulsivity, distractibility, and hyperactivity or excess energy." Hallowell, Edward M., M.D. and Ratey, John J., M.D., Driven to Distraction: Recognizing and Coping with Attention Deficit Disorder from Childhood through Adulthood (Simon & Schuster 1995) at p. 269.

"A conservative estimate would be that 5 percent of school-age children have ADD, and yet it remains poorly understood by the general public, often going unrecognized or misdiagnosed." Driven to Distraction, at p. 41. "The treatment of children [with ADD] has been terrible throughout history...it has often been the overactive children, the ADD kids, who have been subjected to the worst abuse." Driven to Distraction at p. 12.

"ADD is one of several so-called learning disorders... the incidence of other learning disorders coexisting with ADD ranges from 10 to 80 percent." Driven to Distraction, at p. 163.

"[L]anguage problems-and learning disabilities in general...often coexist with ADD, each usually making the other worse." Driven to Distraction, at pp. 33-34. Children with ADD frequently have "secondary psychological problems that typically develop in the wake of the primary neurological problem of ADD. Due to repeated failures, misunderstandings, mislabelings, and all manner of other emotional mishaps, children with ADD usually

In August, 1992, Daniel was evaluated by the Committee on Pre-School Special Education of the New York City Public Schools, an Individualized Education Program (IEP) was provided for Daniel, and Daniel was classified as "speech impaired", a disabling condition under applicable federal and New York State Law. Prior to the start of classes, plaintiff's parents, Posner and Betty Posner ("Betty") (collectively, the "Posners"), met with the Board of Education of the City of New York to determine an appropriate Individualized Education Program ("IEP") for Daniel. The Posners believed that it would be in Daniel's best interest for him to attend an inclusive school, and to supplement his education with private tutoring which specifically addresses his disabilities. After various meetings, Daniel was awarded itinerant services, consisting of private tutoring by Sandra Fine-Marker, MA, CCC, a certified speech pathologist three times a week.

B. Respondents Exclude Disability from Their Non-Discrimination Policy and Retain the Privilege to Request a Disabled Student's Withdrawal.

Respondent Central Synagogue, founded in 1837, is a historic synagogue located on East 55th Street between Lexington Avenue and Park Avenue in Manhattan adjacent to the Sutton Place and Upper East Side neighborhoods. The Central Synagogue Nursery School ("Nursery School") is a day care service, nursery school and kindergarten in Central Synagogue's administrative

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develop problems with their self image and self-esteem." Driven to Distraction, at p. 16.

office building, located across the street from the landmark structure of Central Synagogue.

The respondent Nursery School is a member of the Independent Schools Admissions Association of Greater New York (ISAAGNY) and defendant Solow is on the Board of Trustees of ISAAGNY. ISAAGNY has a written non-discriminatory policy as to students which specifically excludes disability. Similarly, the National Association of Independent Schools has a written nondiscrimination policy which specifically excludes disability.[3] Likewise, respondent Nursery School specifically excludes disability from its written nondiscrimination policy.

The Nursery School Contract between parents and respondent Nursery School provides, inter alia, that:

> " it is the privilege of the school to request that the child be withdrawn, and to refund the tuition for the remainder of the year." (See Appendix at page a35)

Accordingly, defendants as a condition for admittance into the Nursery School maintain an absolute privilege to request a disabled child be withdrawn from Nursery School, and that such privilege allows Nursery School the unfettered mechanism to discriminate against children with disabilities.

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[3] The Cooke Foundation for Special Education, founded by Cardinal Cooke, provides for inclusive education of disabled children. Of the 87 member schools of ISAAGNY, only 3 schools participate in their program.

C. The Defendants Failed to Provide Reasonable Accommodation to a Disabled Child

During the initial two week acclimation period at Nursery School, the door to Daniel's classroom was kept closed, as is the customary practice with any school which has the responsibility to care for such young children. After the two week acclimation period, defendant Mary Solow ("Solow"), the Director of Nursery School, advised Betty that the door to the classroom would remain open and that she would have to sit alone on a chair in the hallway for 3 1/2 hours a day, 5 days a week, for the remainder of the school year. Betty was the only mother required to sit in the hallway with the door wide open. Nursery School made this demand upon Betty, notwithstanding the fact that Betty had advised Nursery School in its Confidential Family Information Form that she had an important job commitment as office manager of a law firm. This arrangement was not beneficial to Daniel as it resulted in Daniel visiting Betty in the hallway rather than participating in the classroom activities with his nondisabled peers. In fact, this arrangement was intended to single out and harass Betty, a working mother of a child with a disability; in reality, it was a ruse to force out Daniel who Nursery School discovered was a disabled child.

On October 8, 1992, Posner wrote a letter on his attorney stationery which was hand delivered to Solow, which stated, inter alia, that:

> "I put your school on notice prior to Daniel starting class that Daniel... experiences a language delay... At the present time, Daniel is not ready for an "open door" environment and this poses a safety concern... I believe the simplest solution is to keep the door closed. If this is not possible, I would suggest you install a children's gate or have one of your own personnel stand guard at the door."

The aforementioned letter is an indisputable request by Posner for Nursery School to make a reasonable accommodation to Daniel, a child with a disability. In the case of a child with a communication and hyperactivity disability, the parents' legitimate safety concerns are heightened, as the child's disability increases the likelihood that the child will wander out of the classroom and impairs the disabled child's ability to understand and perceive dangerous situations and comprehend verbal commands that warn of danger.

D. Pursuant to the Express Terms of the Nursery School Contract, Daniel was Forced to Withdraw from the Nursery School after Only 10 Days

Posner's request upon Solow for reasonable accommodation was unreasonably denied. Solow refused to meet with Posner to discuss providing reasonable accommodation to Daniel. Solow further advised the Posners that aside from leaving the classroom, that Daniel had "other problems", referring to his attentional deficit

hyperactivity disorder. Solow never made a single attempt to accommodate Daniel's disabilities.[4]

Pursuant to the express terms of the Nursery School Contract which provides for the involuntary withdrawal of a child from Nursery School, Nursery School requested that Daniel be withdrawn from the program and Nursery School refunded the pro rata $3,100.00 of the $3,250.00 of tuition paid on behalf of Daniel. Accordingly, Nursery School's claim that Daniel was voluntarily withdrawn is preposterous as Posner would not have been entitled to a pro rata tuition refund in the event of a voluntary withdrawal. Moreover, Posner would not have voluntarily withdrawn Daniel when Daniel had no alternative school to attend.

At the time Daniel was enrolled at Nursery School, there were two white teachers and one black assistant teacher. Pursuant to Part 418.15 of the New York State Social Services Law, if there are more than 14 children in a class of three year olds, there must be three staff. As a result of Daniel's involuntary withdrawal from Nursery School, the class size was reduced to 14 children, which only requires two staff, and the black assistant teacher was terminated and not replaced. Nursery School's termination of the black assistant teacher is further evidence that Nursery School did not have a legitimate reason to request that Betty Posner

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[4] Nursery School's operating permit issued by the Department of Health sets an absolute maximum of 83 students for the facility. (See letter from Department of Health set forth at page a37.) The respondents by their own written admission had 95 students in attendance during the year Daniel attended Nursery School, demonstrating that the respondents were in violation of State law at the time that they discriminated against Daniel.

supplement a staff of three teachers, when two teachers were able to adequately handle the needs of fourteen nondisabled children.

E. Defendants' Unconditional Refusal to Reinstate Daniel is a Separate and Distinct Act of Discrimination

Following Daniel's involuntary withdrawal from Nursery School, Daniel's parents were unable to find an opening in any of the neighborhood schools which were all filled to capacity, causing Daniel to be isolated and alienated from his peers. Six months after Daniel's involuntary withdrawal from the respondent Nursery School, Posner requested that Daniel be reinstated to the defendant Nursery School, as the New York City Board of Education was unable to find a suitable school for Daniel and private schools continued to discriminate against Daniel. On March 23, 1993, the respondent Nursery School unconditionally refused to reinstate Daniel. Respondent's refusal to reinstate Daniel, a child with a disability, is in and of itself a separate act of discrimination.

Daniel was finally placed in a segregated "special needs" nursery school for the 1993/1994 academic school year at an annual cost of $27,000, which is paid for by federal and state funding pursuant to applicable law.[5] Daniel still experiences psychological problems from the trauma of being uprooted from the Nursery School and at the suggestion of his "special needs" school, he now

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[5] "An unwitting party in Danny's nursery school snafu is turns out to be Joe Taxpayer." Mary Voboril, "Dad Slams Closed-Door School Policy", New York Newsday, Nov. 7, 1993, at 8.

requires psychological counseling, as well. See Counselling Report set forth at page a39.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because this case involves the most important civil rights issues of our times. This case involves the educational and civil rights of disabled children which involves a family value and a matter of great public importance.

This Court should grant certiorari to determine the constitutionality of the broad religious exemption of the public accommodations section of the Americans with Disabilities Act of 1990 (the "ADA"). Congress violated the Establishment Clause of the Constitution as the ADA is a civil rights statute designed to protect the due process and equal protection rights of individuals with disabilities.

A further reason for granting certiorari is the substantial public interest in the cost to the taxpaying public of educating children with disabilities. Respondent's discriminatory practices places a further strain on the financial and educational resources of our Nation. Our Nation spends billions of dollars in educating the 10% of the student population which is classified as educationally disabled. It is estimated that there are over one million (1,000,000) pre-school children ages 3 to 5 with disabilities, and that it costs our nation ten billion ($10,000,000,000) dollars to provide these children with their federally mandated education. This esteemed

Court has a responsibility to the taxpaying public to place severe sanctions upon institutions like Central Synagogue that abuse their not-for-profit status by discriminating against disabled children, thus placing an even greater burden on the taxpaying public.

I. This Court Should Grant Certiorari to Resolve Whether the Religious Exemption of Title III of the ADA is an Unconstitutional Violation of the Establishment Clause

A. The ADA Requires that Public Accommodations Modify Their Policies, Practices and Procedures to Provide Reasonable Accommodation to Individuals With Disabilities

This Court should grant certiorari to clarify the broad and sweeping mandate of the ADA which requires that public accommodations modify their policies, practices and procedures to provide reasonable accommodation to individuals with disabilities. 42 U.S.C. § 12182 (b)(2)(A)(ii), (iii). In D'Amico v. New York State Bd. of Law Examiners, 813 F. Supp. 217 (W.D.N.Y. 1993), the District Court held that to succeed on a claim under the ADA, plaintiff need only show that: (1) they are disabled; (2) that their requests for accommodation are reasonable, and (3) that those requests have been denied.

Respondents failed to make reasonable accommodation for Daniel's disability. Nursery School has not justified its refusal to modify its supposed existing practices and policies to make reasonable accommodation to a disabled child who is more susceptible to dangerous situations. The reasonable

accommodations requested by the petitioner would not have "fundamentally altered" the nature of the services provided by Nursery School, or have been an undue financial burden to Nursery School. As Daniel's mother states "I did not understand why they could not simply keep the door closed... They never offered any other possible solutions, such as putting up a gate, or transferring Daniel to another class."

There is a clear connection between the defendants' failure to modify their purported "open door" policy and Daniel's speech impairment and attentional deficit disorder. Daniel has a receptive and expressive speech/language disorder which has a pervasive effect on Daniel's ability to process and understand language, and accordingly, a "closed door" environment is a necessary accommodation for Daniel. Furthermore, the attributes of an ADD child, namely, hyperactivity, lack of impulse control and inability to focus, are totally incompatible to an "open door" environment and pose a legitimate safety concern.

Defendants assertion of a long standing "open door" policy for 3 year old children is absurd. In reality, defendants have a long standing "closed door" policy towards children with disabilities. Respondent's were aware that Daniel's father was an attorney and so the respondents engaged in clever and deceptive means to harass and exclude Daniel. The respondents have failed to justify why alternate measures to the "open door" policy were not instituted. Posner's suggestions that a gate be installed or that the respondents assume the responsibility of ingress and egress from the classroom door were rebuked by the respondents. In fact, the respondents

never responded to Posner's demand letter for "reasonable accommodation". Certainly, the nominal cost of a children's gate would not be a financial burden to the defendants who charged $5,300 for a half-day of classes.

Under the D'Amico standard for an ADA discrimination claim, petitioner Daniel has a prima facie case of disability discrimination, as petitioner has fully demonstrated that: (1) he is disabled by virtue of his communication disorder and attentional deficit, a learning disorder; (2) that the Posners' written requests on his behalf that Nursery School keep the classroom door closed, install a children's gate at the door, or have one of their own personnel monitor the door, so that petitioner not endanger himself as a result of the limitations imposed by his communication disorder and attentional deficit disorder, were requests for reasonable accommodation; and (3) the respondents unreasonably denied the requests.

Based on documentary evidence submitted to the respondents prior to the start of classes, the respondents were aware of 3 important matters: (i) Daniel suffered from a speech/language disability which impacted his ability to understand directions, as well as a hyperactivity problem which prevented him from functioning in an "open door" environment; (ii) Daniel's parents had a legitimate heightened concern for his safety because of his limitations imposed by his speech/language and attentional deficit disabilities and expressed this concern in writing; and (iii) Daniel's mother had an important job commitment during classroom hours. Insistence on maintaining the door to the classroom open and

defendants demanding that Daniel's mother sit alone in a chair in the hallway each day is a clear act of disability discrimination, as the ADA specifically prohibits the singling out and harassing of individuals with disabilities and their families.

B. The religious exemption under the ADA for Public Accommodations is Unconstitutional

The characterization of a private, state licensed nursery school (or day care service) as subject to the Title III religious exemption is a violation of Constitutional rights of due process and equal protection of pre-school children with disabilities. In particular, the nondiscrimination provisions of the ADA are not such an "excessive entanglement" of government regulation over religion as to override the compelling governmental interest in educating pre-school children with disabilities.

Section 307 of the ADA violates the Establishment Clause of the First Amendment. The Section 307 exemption does not satisfy the three tests outlined in Lemon v. Kurtzman, 403 U.S. 602 (1971), at 612-613. See also DeMarco v. Holy Cross High Sch., 4 F.3d 166, (2d Cir. 1993). The Court has employed a three-pronged test in determining whether there has been a violation of the Establishment Clause: [1] whether the challenged law or conduct has a secular purpose, [2] whether its principal or primary effect is to advance or inhibit religion, and [3] whether it creates an excessive entanglement of government with religion. Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355, 1362, 79 L. Ed.2d 604 (1984).

In Corporation of the Pres. Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987), the Supreme Court stated that in applying the second part of the Lemon test, "[t]he proper inquiry is whether Congress has chosen a rational classification to further a legitimate end." Amos at 338. The ADA-Title III religious exemption cannot be said to be rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions. Clearly, the religious exemption statute demonstrates a favoring of the sovereign over the church with no rational basis or compelling governmental purpose, especially as it relates to disabled individuals, a discrete and insular minority.

II. This Court Should Grant Certiorari to resolve whether violation of the civil rights of a pre-school child with a disability by a private, state licensed day care center constitute "state action" under Section 1983

This Court should grant certiorari because there are no Sec. 1983 cases dealing specifically with privately funded nursery schools. Only by "sifting facts and weighing circumstances" can we determine whether the actions of a private defendant constitutes "state action". Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961). The fact that Nursery School is privately funded is irrelevant to the analysis of "State Actor". What is relevant is Daniel's status as a child with a disability and his right as a pre-school child to a free and appropriate education and that Nursery School's actions directly effected a pre-school child with a disability

who is guaranteed an education pursuant to applicable federal and state law.

The respondent, through the operation of a day care center, as defined and regulated in Article 47, are acting "under color of state law" for purposes of Section 1983. Petitioner has sufficiently shown the existence of overt and significant participation of New York State in the establishment, regulation, and operation of day care services. Once the respondents were authorized to operate a day care service, they subjected themselves to the jurisdiction of and the obligation of strict compliance with the excruciating detailed regulatory scheme.

Nursery School, as a state licensed private day care center, is also subject to Part 418 of the New York State Social Services Law which provides, inter alia, that:

> "a child day care center... may not refuse to admit a disabled child... and reasonable modifications can be made in the premises and/or program to accommodate the child..." (emphasis added) 18 NYCRR Part 418.4(c)(25)

Daniel was entitled to reimbursement from the state for the cost of his education at Nursery School. Florence County School District Four v. Carter, 114 S. Ct. 361; 126 L. Ed. 2d 284 (1993). (parents of a disabled child may seek reimbursement under the Individuals with Disabilities Act ("IDEA") from a private school not approved by the State). Accordingly, when Nursery School enrolled Daniel, Nursery School accepted the State's delegation of

its responsibility to educate pre-school children with disabilities in the least restrictive environment. The dissent in Rendell-Baker v. Kohn, 457 U.S. 830 (1982) points out, that if the alleged discriminatory conduct was against a "special needs" student at the private school, the majority would have found that "state action" exists under that set of facts and circumstances.

The state action doctrine applies to Nursery School even in the absence of a direct contract with the State. United States v. Wiseman, 445 F. 2d 792, 795 (2d Cir.), cert. denied, 404 U.S. 967, 92 S. Ct. 346 (1971) (acts of private process servers constituted "state action" despite the fact that "defendants were neither state employees nor employees of a person who was under contract with the State") Clearly, Nursery School's discriminatory conduct directed towards a pre-school child with a disability entitled to a free, appropriate education under the IDEA constitutes "state action".

The instant case is similar to the "facts and circumstances" which were before the Second Circuit in Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974). In Perez, plaintiff brought a §1983 action against municipal and private child-care institutions alleging a deprivation of due process and equal protection. In another similar case, Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977), the Second Circuit reaffirmed their finding of state action as to the private child care institutions. See also Wilder v. Bernstein, 848 F.2d 1338 (2d Cir. 1988).

The State is mandated by Federal law to provide a free, appropriate education for disabled pre-school children which may be enrollment in a "special needs" school, placement in a class for disabled children in an integrated school, or placement in a class with nondisabled children. However, in the case of a pre-school child of age 3, there are no public schools offering the requisite pre-school services. Accordingly, private day care centers and nursery schools become "state actors" in fulfilling the state's obligation in educating "children with disabilities" in an inclusive educational environment.

III. This Court Should Grant Certiorari to Exercise its Power of Supervision where the Court of Appeals Improperly Invoked Collateral Estoppel of a State Court Order

A. The Respondents' Failure to Plead the Affirmative Defense of Collateral Estoppel is an Absolute Bar to its Application

This Court should grant certiorari to clarify whether the Second Circuit's attempt to broaden the scope of the doctrine of collateral estoppel is appropriate. In fact, the respondents have never even sought dismissal or summary judgment in their motion papers on the basis of collateral estoppel. The effect of collateral estoppel was first brought in the final hearing before the District Court on February 3, 1994, in which Judge Leonard Sand, acting as though he was counsel for Central Synagogue, questioned "Now, does that [state court] determination have any collateral estoppel

effect or any impact on this litigation?" The respondent stated, "I must be honest with you, I haven't researched it expressly..."

Respondents' moving papers for dismissal of the complaint never raised collateral estoppel as an affirmative defense or basis for dismissal. The district court in Thomas v. City of New York, 814 F.Supp. 1139 (E.D.N.Y. 1993), supra at 1147, stated this essential requirement:

> "Since res judicata is an affirmative defense, the party asserting it has the burden of showing that the doctrine is applicable, Fed. R. Civ. P. 8(c);

Likewise, the Supreme Court in Blonder-Tongue Labs, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328, 333 (1971) held that:

> "Res judicata and collateral estoppel are affirmative defenses that must be pleaded. Fed. Rule Civ. Proc. 8(c). The purpose of such pleading is to give the opposing party notice of the plea of estoppel and a chance to argue, if he can, why the imposition of an estoppel would be inappropriate."

In the instant case, petitioner never had the opportunity in District Court to demonstrate why the imposition of collateral estoppel would be inappropriate.

B. The Petitioner Did Not Have a Full and Fair Opportunity to Litigate his Claims in the State Courts

This Court should grant certiorari to clarify whether this case's unique factual and procedural matters are sufficient grounds for invoking collateral estoppel, in light of the competing requirement that the estoppel can of course be met and offset with a showing by the other side that the earlier action did not offer a "full and fair opportunity" to litigate the issue. See Kossover v. Trattler, 82 A.D.2d 610, 442 N.Y.S.2d 554 (2d Dep't 1981). See also, B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967). As a safeguard, trial courts should require the party against whom preclusion is sought to demonstrate, if he can, that he did not have "a fair opportunity, procedurally, substantively and evidentially to pursue his claim the first time." Blonder-Tongue Labs, supra at 348.

A motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7) based on a claim's lack of substantive merit, summary established by affidavits and other proof, will get estoppel effect. However, under the Court of Appeals decision in Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976), this type of disposition is likely only if the court elected to treat the CPLR 3211(a)(7) motion as one for summary judgment. Accordingly, the State Court's denial of petitioner's motion for leave to amend the complaint, which was not treated as one for summary judgment, should not be afforded collateral estoppel effect. In the instant case, the State Supreme Court denied amendment to the Complaint for the petitioner's cause

of action for violation of the Human Rights Law on the face of the pleadings alone, without even an affidavit from the respondents, in a case in which discovery had not commenced. As a further matter, the State Supreme Court never even assumed jurisdiction as it refused to allow the transfer of the case to that Court.

Petitioner did not have a fair opportunity to litigate his claim in State Court as evidenced by the highly biased State Court Opinion of Judge Burton S. Sherman who made a personal attack upon Posner charging "abuse of his position and privileges as an attorney" for suing a synagogue. Judge Sherman engaged in serious acts of impropriety by engaging in ex parte communications with respondents and providing respondents with an "unsigned" and not entered draft of his opinion. Respondents make the incredulous claim that they received the "unsigned" opinion from the United Lawyers Service in the regular course of business. This indisputable and verifiable act of judicial misconduct has been totally disregarded by all of the State and Federal Courts which this case has been before, the Commission on Judicial Conduct, and the Grievance Committee. This Court should grant certiorari to exercise its power of supervision where a federal court gave collateral estoppel effect to a State Court decision reeking with impropriety and judicial misconduct.

C. The State Court Applied a Clearly Erroneous Legal Standard for Disability Discrimination

The most compelling reason why this Court should grant certiorari in regard to the collateral estoppel issue, is to clarify that

in the instant case, the petitioner still has a viable claim for disability discrimination, because the State Court decision failed to apply the "reasonable accommodation" standard applicable to an ADA disability discrimination claim. To establish a prima facie case of disability discrimination petitioner need not demonstrate discriminatory intent; however, failure by an entity to modify its existing policies, procedures and practices to provide "reasonable accommodation" to an individual with a disability constitutes discrimination by reason of a disability.

The Court of Appeals acknowledges that there is a nexus between Daniel's disability and Nursery School's insistence that the door to Daniel's nursery classroom remain open because "Daniel suffers from a language disorder that prevents him from following instructions to remain in the classroom." (a3) Daniel has unequivocally established that (1) he is an individual with a disability; (2) a request for reasonable accommodation was made; and (3) the request was denied without a showing that the modification to Nursery School's policy would be unduly burdensome or disruptive. Accordingly, the "reasonable accommodation" standard under the ADA does not require a "showing of discriminatory intent," and it is imperative that this esteemed Court clarify this important distinction.

Moreover, the State cause of action under the New York State Human Rights Law is limited to the educational institution's denial of the use of its facility to a student with a disability, whereas, the ADA provides for a much broader coverage of its disability non-discrimination provisions. The ADA clearly states

that a nursery school has an affirmative responsibility to modify its established practice, policies and procedures to provide "reasonable accommodation" to a child with a disability.

Finally, this Court should grant certiorari to clarify that the State Court decisions never addressed Nursery School's refusal to reinstate Daniel which is a separate and distinct act of discriminatory conduct which cannot be afforded collateral estoppel effect as it was ignored by the State Courts.

The Second Circuit's judgment departed from the accepted and usual role to be performed by a Court on motions for summary judgment. The case should have proceeded to trial on the merits. Daniel, a child with a disability, has faced a "closed door" at Nursery School and now has been faced with a "closed door" to our system of justice. The highest Court of our land must "open the door" to justice for children with disabilities.

CONCLUSION

For all the foregoing reasons, this Court should grant the petition for a writ of certiorari and, upon review, should reverse the Judgment of the Second Circuit affirming the opinion and order of the District Court granting Summary Judgment in favor of the defendants and dismissing the complaint.

Respectfully Submitted,

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APPENDIX A - ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MAY 30,1995

At a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York on the 30th day of May one thousand nine hundred and ninety-five.

PRESENT:

HON. J. EDWARD LUMBARD,
HON. FRANK X. ALTIMARI,
HON. J. DANIEL MAHONEY,
Circuit Judges.

DANIEL J. POSNER, a minor,
by his parent, Louis J. Posner.
Plaintiff-Appellant,

-v.- 94-6273

CENTRAL SYNAGOGUE, CENTRAL SYNAGOGUE NURSERY SCHOOL; MARY SOLOW, as Director of Central Synagogue Nursery School,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Defendant-Intervenor-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel for the Defendants - appellees, and by Plaintiff-appellant Louis J. Posner, Esq., on his own behalf and that of Plaintiff-appellant Daniel J. Posner.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Plaintiffs-appellants Louis J. Posner ("Posner") and his son, Daniel J. Posner ("Daniel"), appeal from a judgment entered in the United States District Court for the Southern District of New York (Sand, J.), granting summary judgment in favor of Defendants-appellees Central Synagogue, Central Synagogue Nursery School and Mary Solow (collectively "Central Synagogue") on the ground that the action instituted in the district court was collaterally estopped. We affirm for substantially the reasons stated by the district court.

Posner contends that Central Synagogue discriminated against his son, Daniel, by failing to accommodate the child's language disorder, which Posner contends is a disability within the meaning of the Education of the Handicapped Act, 20 U.S.C. §§ 1401 et seq., the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq., the Developmentally Disabled Assistance and Bill of Rights

Act, 42 U.S.C. §§ 6000 et seq., and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq. Posner filed an action in the United States District Court for the Southern District of New York alleging that the discriminatory conduct violated 42 U.S.C. § 1983.

The allegedly discriminatory conduct at issue is Central Synagogue's insistence that the door to Daniel's nursery classroom remain open to facilitate access by other children to the bathrooms, and, in certain cases, to their parents. Posner asserts that Daniel suffers from a language disorder that prevents him from following instructions to remain in the classroom. In other words, Daniel tends to leave the classroom without permission.

When Daniel first began leaving the classroom, the nursery school, in conformity with a brochure given to parents, asked that Posner or the child's mother, Betty Posner, accompany Daniel during the school day to ensure that he remained in the classroom. After Daniel's mother spent one day sitting in the hallway outside her son's classroom, Posner sent a hand delivered letter, drafted on the letterhead of his law practice, to Central Synagogue. Posner advised the school that, although he was aware that his son was "persistently leaving the class room," his wife was needed in his law office and consequently could no longer serve as a "door guard." Posner asked that the school solve the problem in some way other than through parental involvement, or in the alternative, that the school "expel" Daniel and refund the tuition. In the meantime, the Posners did not send Daniel to school.

Six days later, when Daniel had not returned to school, Central Synagogue returned, or forgave, all but $ 150 of the more than $ 5,000 annual tuition. During the intervening six days, however, Posner had asked Central Synagogue to refund, in addition to the nursery school tuition, the $ 1,175 that the Posners had paid in unrelated temple dues. When Central Synagogue refused, Posner sued.

He first filed an action in New York Civil Court in November 1992, claiming that Central Synagogue had breached an implied contract to retain Daniel in the nursery school. Posner sought $ 1,175 in damages, the amount paid in membership dues. The complaint did not allege discrimination.

In early January 1993, Posner threatened to amend his Civil Court claim to seek "substantial unasserted consequential damages," as a result of trauma to Daniel, and injury to Posner's law practice, if the claim was not settled for $ 1,175. The letter advised defendants' counsel that its "client should be forewarned not to underestimate the substantial amount of time and expense this matter may entail;" the letter contemplated the need for "extensive discovery", and predicted deposing defendant Mary Solow as well as "perhaps other employees or agents of Central Synagogue."

Two days later, Posner followed through and amended the Civil Court complaint's ad damnum clause. The amended complaint sought $ 22,500 in "consequential" damages based solely on the

alleged breach of contract. The complaint alleged simply that Daniel was "constructively expelled." No additional facts were pleaded.

On March 13, 1993, Posner wrote yet another letter to Central Synagogue. It appears, despite Posner's claim in the letter to the contrary, that for the first time he advanced the theory that Daniel had been the victim of discrimination on the basis of his speech impairment. The letter further advised defendants' attorneys that Posner noticed a "pattern of discrimination" at the nursery school. He based this allegation on his personal observation that there were no minority students in the school. Posner then put defendants on notice that "juries in New York County are sympathetic to discrimination suits, . . . well represented by members of the Black and Hispanic communities, and . . known for awarding substantial damages."

When Central Synagogue acquiesced to Posner's threats, offering to refund his membership dues, Posner sought Daniel's reinstatement, on the express condition that neither parent be required to attend. The school advised Posner that, as a matter of policy, it required parental availability until the teacher determined that it was no longer necessary, and accordingly declined to reinstate Daniel on Posner's terms. The next day, in apparent retaliation, Posner rejected the proffered membership dues as paltry and insulting. In the same letter, Posner suggested that the already-amended ad damnum clause was "substantially understated," in light of Posner's new theory that his child had been the victim of discrimination. Accordingly, the letter concluded, Posner planned to file "at some future date" another lawsuit seeking "in excess of

One Million ($ 1,000,000) Dollars." Posner also warned of his immediate intention to move to compel discovery in the pending suit. He had, by then, already served notices with requests for document production that, as described by the State Supreme Court, were "extremely burdensome."

On April 15, 1993, some three weeks later, Posner filed the instant action in the Southern District of New York. He also moved to remove the Civil Court action to New York State Supreme Court, and to amend the complaint to allege the unlawful discrimination complained of here. On October 12, 1993, the New York Supreme Court, New York County, denied Posner's motions to remove and to amend. In pertinent part, that court said,

> Mr. Posner's thesis herein is that defendant violated Executive Law Sect. 296(4) [Human Rights Law] by denying Daniel the use of its facilities because Daniel had a speech disability. His thesis is bereft of current or prospective support, as well as[] common sense. Daniel was 3 years old. The nursery school has a policy of keeping the door to the classroom open so that the children could go to the bathroom, as well as see their parents in the hallway until it was determined that parental proximity was no longer necessary. It is undisputed that Daniel frequently ran out of the classroom. Mr. Posner wanted the classroom door closed. He did not get his way and as a result he withdrew Daniel from nursery school. The vexatious litigation he instituted thereafter is described above. He started with a simple

> suit to recover his $ 1,[1]75 membership fee which he escalated to a federal action for $ 12,000,000.
>
> This court will not encourage Mr. Posner's further abuse of his Position and privileges as an attorney.

The New York State Supreme Court:, Appellate Division, First Department, affirmed both the denial of the motions, and the Supreme Court's imposition of costs on the motion. Posner v. Central Synagogue, 202 A.D.2d 284, 609 N.Y.S.2d 195 (1st Dep't 1994). The New York Court of Appeals denied leave to appeal. 83 N.Y.2d 953, 615 N.Y.S.2d 878 (1994). The First Department, in a published decision, held that the Supreme Court had "properly determined" that the suggestion that Daniel had been discriminated against "was devoid of merit and patently insufficient on its face." 202 A.D.2d at 284, 609 N.Y.S.2d at 196. After a brief review of the pertinent facts, the Appellate Division concluded that Posner had "failed to establish any factual or legal basis for the proposed amended claim that the defendant had engaged in discriminatory conduct." 202 A.D.2d at 285, 609 N.Y.S.2d at 196.

The district court granted summary judgment to Central Synagogue on the ground that two state court tribunals had determined that the discrimination allegations were without merit. According these determinations the deference to which they were due, the district court found that the federal action was collaterally estopped.

The Full Faith and Credit Clause requires the federal courts to give the same preclusive effect to state court determinations as

would be afforded them in the state courts. See 28 U.S.C. § 1738; see also Milltex Indus. Corp. v. Jacquard Lace Co., 922 F.2d 164, 166 (2d Cir. 1991). Two requirements must be met before a party can be precluded from relitigating an issue: (1) there must have been a full and fair opportunity to contest the issue; and (2) the issue must be identical to an issue that was necessarily decided in the prior action. See, e.g.:, Cameron v. Fogarty, 806 F.2d 380, 384-85 (2d Cir. 1986), cert. denied, 481 U.S. 1016 (1987); Lanzano v. City of New York, 202 A.D.2d 378, 379, 609 N.Y.S.2d 891, 892 (1st Dep't), leave to appeal denied, 83 N.Y.2d 760, 616 N.Y.S.2d 14 (1994). For purposes of issue preclusion, "a final judgment may include 'any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.'" Kay-R Elec. Corp. v. Stone & Webster Constr. Co., 23 F.3d 55, 59 (2d Cir. 1994). In this case, it is abundantly clear that the New York courts would consider the foregoing proceedings to have conclusively resolved the discrimination issue.

We reject Posner's strained argument that the 1993 federal action somehow preceded the 1992 state court action. He has cited no authority, and we are aware of none, that supports the proposition that the filing of a federal action during the pendency of a state court action will insulate the former from any estoppel effects of the latter.

We likewise reject the argument that Posner was not afforded adequate notice that the doctrine might be invoked against him. At oral argument, the district court advised the parties that, in its view, the federal action was precluded. Following argument,

Posner wrote the court a letter in which he apparently argued against the application of the doctrine. See Def.'s Br. at 21. And, as the district court properly found, the later appellate review cured any existing defect. cf. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481 n.21 (1982) ("[t]here is no requirement that judicial review must proceed de novo if it is to be preclusive."); Kay-R Elec., 23 F.3d at 59 ("'the opportunity for appellate review has played an important role in insuring the quality of decisions offered as a basis for preclusion'") (citation omitted). Blonder-Tongue Labs, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), cited by Posner, does not address the due process requirements of collateral estoppel. See id. at 330.

Finally, Posner argues that the ADA claim is still viable because the statute requires no showing of discriminatory intent, the claim rejected by each court thus far confronted with the question. We need not address that contention: the ADA claim fails for another reason. Posner cannot satisfy 42 U.S.C. § 1983's requirement of "state action." We are aware of no cases, and Posner has identified none, in which state action was found by a privately funded nursery school. The cases upon which Posner relies are factually inapposite. See, e.g., Wilder v. Bernstein, 848 F.2d 1338, 1341 (2d Cir. 1988) (approving settlement in class action against institutions to whom children removed by the state from parental custody are entrusted); Duchesne v. Sugarman, 566 F.2d 817, 820-22 (2d Cir. 1977) (state action existed where New York City Bureau of Child Welfare turned abandoned children over to institutions that contracted to provide such services to municipality); Perez v. Sugarman, 499 F.2d 761, 765 (2d Cir. 1974) (finding state

action by private institutions assuming custody of abandoned or neglected children by virtue of the comprehensive statutory system designed to address needs of such children.)

Although we have considered seriously Central Synagogue's request for costs or sanctions, and we caution Posner that his conduct is unbecoming of a member of the bar, we decline to assess costs or sanctions.

The judgment of the district court is AFFIRMED.

Hon. J. Edward Lumbard,

Hon. Frank X. Altimari

Hon. J. Daniel Mahoney

Circuit Judges.

APPENDIX B - ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT, FILED SEPTEMBER 21, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DANIEL J. POSNER, a minor,	:	
by his parent,	:	93 CIVIL 2448(LBS)
LOUIS J. POSNER,	:	
	:	
Plaintiff,	:	JUDGMENT
	:	
-against-	:	
	:	
CENTRAL SYNAGOGUE, CENTRAL	:	
SYNAGOGUE NURSERY SCHOOL,	:	
and MARY SOLOW as	:	
DIRECTOR of CENTRAL	:	
SYNAGOGUE NURSERY SCHOOL,	:	
	:	
Defendants.	:	

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Defendants having moved for summary judgment and the said motion having come before the Honorable LEONARD B. SAND, U.S.D.J., and the Court thereafter on September 19, 1994,

having rendered its opinion (#73694); granting summary judgment for the defendants, it is,

ORDERED, ADJUDGED AND DECREED: That defendants' motion for summary judgment be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed for the reasons stated in the Court's Opinion, dated September 19, 1994.

DATED: NEW YORK, NEW YORK
September 21, 1994

_____
Clerk

By:_____
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DANIEL J. POSNER, a minor,	:	
by his parent,	:	93 CIV. 2448(LBS)
LOUIS J. POSNER,	:	
Plaintiff,	:	OPINION
	:	
-against-	:	
	:	
CENTRAL SYNAGOGUE, CENTRAL	:	
SYNAGOGUE NURSERY SCHOOL,	:	
and MARY SOLOW as	:	
DIRECTOR of CENTRAL	:	
SYNAGOGUE NURSERY SCHOOL,	:	
Defendants.	:	

----------X

APPEARANCES: September 19, 1994

LOUIS J. POSNER, ESQ.
Attorney for Plaintiff

GOLD, FARRELL & MARKS
Attorneys for Defendants
41 Madison Avenue
New York, New York 10010-2201
LINDA YASSKY, ESQ.
ROBERT P. MULVEY, ESQ.

MARY JO WHITE, ESQ.
United States Attorney for the
Southern District of New York
PING C. MOY, ESQ.
KEN NAKATA, ESQ.
Assistant U.S. Attorneys

HONORABLE LEONARD B. SAND, U.S.D.J.

SAND, J.

Louis Posner has brought this action on behalf of his minor son, Daniel, charging that the Central Synagogue Nursery School (and related defendants) discriminated against Daniel on the basis of the boy's speech impairment. Specifically, Mr. Posner claims that the school "constructively expelled" Daniel because of his handicap, thereby depriving him of rights secured by The Education of the Handicapped Act, 20 U.S.C. §§ 1401 et seq., The Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq., The Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000 et seq., and The Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. -- all in violation of 42 U.S.C. § 1983. Mr. Posner also argues that defendants' actions violated his son's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Finally, he has mounted a constitutional challenge to the exemption for religious organizations contained in The Americans With Disabilities Act, 42 U.S.C. § 12187, in the event this court were to find that the defendants come within the exemption.

The critical problem with Mr. Posner's action in this court is that two New York state courts have already found that the facts surrounding his claim of discrimination against his son cause his claim to be completely meritless. These prior determinations preclude Mr. Posner from relitigating the discrimination question in this court. We therefore grant the defendants' motion for summary judgment, without need to pass upon the merit of the various claims and defenses presented.

BACKGROUND

The dispute between Mr. Posner and the defendants arose shortly after Daniel Posner began attending Central Synagogue Nursery School on September 21, 1992. When school officials noted how Daniel would frequently run out of the classroom, they requested that one of his parents come to school and sit in the hallway in order to discourage him from leaving the classroom without the teacher's knowledge or permission. (Solow Aff. P 11). The Posners complied in part: Mrs. Posner spent a day seated outside Daniel's classroom. But subsequently, Mr. Posner insisted that the proper way to deal with the situation was for the school either to keep the classroom door closed, install a children's gate, or have a member of school personnel stand guard at the door. The school rejected these suggestions on the grounds that its long-standing policy was to keep the schoolroom door open in order that children having difficulty adjusting to a school environment could have ready access to a parent waiting nearby. (Solow Aff. pp. 12, 14). The Posners withdrew Daniel from the school that same October.

In December, 1992, Mr. Posner commenced a breach-of-contract action against Central Synagogue in New York Civil Court for the purpose of recovering $ 1,175 in membership dues previously paid the Synagogue. In April, 1993, he moved to remove the civil court action to New York Supreme Court, and to amend his complaint to include an allegation that Central Synagogue had unlawfully discriminated against Daniel, in violation of New York Human Rights Law, N.Y. Exec. § 296(4), when it allegedly expelled him from the nursery school because of his speech impairment.[6] The Supreme Court denied both motions. With regard to the motion to add the discrimination claim, the court found that

> [Posner's] thesis is bereft of current or prospective support, as well as, common sense. Daniel was 3 years old. The nursery school has a policy of keeping the door to the classroom open so that children could go to the bathroom, as well as see their parents in the hallway until it was determined that parental proximately [sic] was no longer necessary. It is undisputed that Daniel frequently ran out of the classroom. Mr. Posner wanted the classroom door closed. He did not get his way and as a

---

[6] N.Y. Exec. Law § 296(4) provides that:

It shall be an unlawful discriminatory practice for an education corporation or association which holds itself out to the public to be non-sectarian and exempt from taxation . . . to deny the use of its facilities to any person otherwise qualified, by reason of his race, color, religion, disability, national origin, age or marital status (emphasis added)

result he withdrew Daniel from nursery school. Accordingly, plaintiffs' motion is denied.

The Appellate Division affirmed the Supreme Court's denial of the motion to amend. Noting that leave to amend a complaint should not be granted in cases where the proposed amendment is plainly lacking in merit, the court concluded that

> the [Supreme Court] properly determined, based upon the record and documentary evidence, that the proposed amendment . . . was devoid of merit and patently insufficient on its face. . . . Plaintiff Posner's own letters and pleadings reveal that his son, Daniel, frequently ran out of the nursery school classroom for no apparent reason, that the defendant had a legitimate reason, implemented as a school policy, for the classroom door to remain open, and that plaintiff Posner himself had voluntarily withdrawn Daniel from the nursery school, when the defendant refused to change its nondiscriminatory policy. Accordingly, plaintiff failed to establish any factual or legal basis for the proposed amended claim that the defendant had engaged in discriminatory conduct.

The New York Court of Appeals denied plaintiff's motion for leave to appeal the Appellate Division's ruling.

II
Discussion

A federal statute, 28 U.S.C. § 1738, requires federal courts to give preclusive effect to state court judgments whenever the courts of the state from which the judgments issued would do so. In New York, the doctrine of collateral estoppel bars relitigation of an issue where that same issue has necessarily been decided in a prior action and where the party to be barred had a full and fair opportunity to contest the prior decision. Lanzano v. The City of New York, 609 N.Y.S.2d 891, 892 (N.Y. App. Div. 1994).

In our view, there is little doubt that the Supreme Court's denial of the motion to amend, as well as the appellate court's affirmance, amounted to a finding that, on the underlying facts, there was no merit to Mr. Posner's state law discrimination claim. See Wieder v. Skala, 563 N.Y.S.2d 76, 76-77 (N.Y. App. Div. 1990) ("Leave to amend a complaint is not granted upon mere request without a proper showing. Rather, in determining whether to grant leave to amend, a court must examine the underlying merit of the cause of action asserted therein . . . "). It is also clear that Mr. Posner had a fair opportunity to address the merits of his discrimination claim to the state tribunals. While the claim admittedly arose in a somewhat indirect procedural manner (originating, as it did, on a motion to amend the civil court complaint), any doubt as to whether Mr. Posner knew that he was at a point in his litigation where he had to press the merits of his amendment was cured by the later appellate review of the Supreme Court's ruling. That review provided the notice and hearing

necessary to justify preclusion now. See Kremer v. Chemical Constr. Corp., 456 U.S.C. 461, 481 n.21 ("There is no requirement that judicial review must proceed de novo if it is to be preclusive.").

Once we accord the state court findings the respect we must, Mr. Posner's federal claims cease to have any basis. All of Mr. Posner's federal claims -- be they of constitutional or statutory dimension -- depend, at the very least, on a connection between the nursery school's decision not to alter its long-standing "open door" policy in Daniel's case, on the one hand, and Daniel's speech impairment, on the other hand. If no such connection existed, there could be no discrimination, however broadly or loosely that term is defined. Two New York courts have assessed the merits of Mr. Posner's claim that there was just such a connection; that is, that the defendants discriminated against Daniel because of Daniel's speech disability. Both courts found that the decision to remove Daniel from the nursery school was taken by Daniel's parents as a result of what may best be characterized as Mr. Posner's "policy dispute" with the school regarding child-care management--a dispute having nothing whatsoever to do with the boy's handicap.

Simply put, there is no reason to believe that Mr. Posner could succeed on any of his federal claims consistently with the judgment of the New York courts that Daniel's speech disability had nothing to do with the nursery school's insistence on its "open door" policy.

Given that Mr. Posner, on behalf of his son, has had his day in court on the factual issue of whether the defendants took any

adverse action with regard to his son's handicap, which factual determination is binding and precludes all of his present statutory and constitutional claims, summary judgment for the defendants is granted.

SO ORDERED.

Dated: September 19, 1994
New York, New York

_____
U. S . D. J .

APPENDIX C - ORDER AND CERTIFICATE OF CONSTITUTIONAL CHALLENGE OF THE UNITED STATES DISTRICT COURT, FILED DECEMBER 2, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DANIEL J. POSNER, a minor,	:	
by his parent,	:	93 CIV. 2448(LBS)
LOUIS J. POSNER,	:	
Plaintiff,	:	
	:	
-against-	:	
	:	
CENTRAL SYNAGOGUE, CENTRAL	:	
SYNAGOGUE NURSERY SCHOOL,	:	
and MARY SOLOW as	:	
DIRECTOR of CENTRAL	:	
SYNAGOGUE NURSERY SCHOOL,	:	
Defendants.	:	

----------X

ORDER AND CERTIFICATE
OF CONSTITUTIONAL CHALLENGE

In this action, the Defendants Central Synagogue, Central Synagogue Nursery School, and Mary Solow as Director of Central Synagogue Nursery School have filed a motion for summary judgment to dismiss the complaint alleging discrimination against a child with a disability by a private, state licensed day care center

for lack of jurisdiction under 42 U.S.C. § 1983, the Civil Rights Act and 42 U.S.C. §§ 12101 et seq., the Americans with Disabilities Act. One basis for this motion is the mandate of 42 U.S.C. §12187, the Americans with Disabilities Act Title III exemption for religious organizations and entities controlled by religious organizations. The Plaintiff's response to Defendants' motion includes a challenge to the constitutional validity of the cited federal statute as it is overly broad and impermissibly infringes upon the rights of preschool children with disabilities to be free from discrimination on the basis of their disabilities.

Accordingly, as required by 28 U.S.C. § 2403 and pursuant to Fed. R. Civ. P., Rule 24(C), this court hereby certifies to the Attorney General of the United States that in this action, to which the United States is not a party, the constitutionality of the above-referenced federal statute has been placed in issue.

The United States may, therefore, intervene in this action for purposes of briefing the constitutional question thus raised and shall have thirty days from and after the date set forth below to file said brief.

Dated: December 2, 1993

Leonard B. Sand

United States District Judge

APPENDIX D - ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DENYING REHEARING, FILED AUGUST 29, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-ninth day of August one thousand nine hundred and ninety-five.

DANIEL J. POSNER, a minor,
by his parent,
LOUIS J. POSNER,

Plaintiff-Appellant,

-against-

Dkt No: 94-6273

CENTRAL SYNAGOGUE, CENTRAL
SYNAGOGUE NURSERY SCHOOL,

and MARY SOLOW as
DIRECTOR of CENTRAL
SYNAGOGUE NURSERY SCHOOL,

Defendants-Appellees,

UNITED STATES OF AMERICA,
Defendant-Intervenor-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Daniel J. Posner, a minor, by his parent Louis J. Posner,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, CLERK
By: Beth J. Meador
Administrative Attorney

APPENDIX E - ORDER OF THE NEW YORK STATE APPELLATE DIVISION, FIRST DEPARTMENT, FILED MARCH 17, 1994

SUPREME COURT OF NEW YORK,
APPELLATE DIVISION, FIRST DEPARTMENT

Louis J. Posner, et al.,
Plaintiffs-Appellants, v. Central
Synagogue, Defendant-Respondent.
51347N

202 A.D.2d 284; 609 N.Y.S.2d 195;
1994 N.Y. App. Div. LEXIS 2501

March 17, 1994, Decided
March 17, 1994, Entered

NOTICE: [**1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

JUDGES: Murphy, P.J., Kupferman, Asch, Williams, Tom, JJ.

OPINION: [*196] Order, Supreme Court, New York County (Burton Sherman, J.), entered October 15, 1993, which, inter alia, denied plaintiffs' motion pursuant to CPLR 325(a) and (b) seeking to transfer their action from the New York Civil Court to the New York State Supreme Court, and for leave to amend their complaint

pursuant to CPLR 3025(b), and which directed plaintiff pro se Louis J. Posner, as attorney for the plaintiffs, to pay $ 100 in motion costs to defendant's counsel, unanimously affirmed, with costs.

The IAS court did not abuse its discretion in denying plaintiffs leave to amend their complaint - for the third time in the underlying action - to allege an additional cause of action for violation of the Human Rights Law (Executive Law @ 296[4]) based upon the defendant's alleged discrimination against the infant-plaintiff, Daniel, and in denying plaintiffs leave to increase the ad damnum clause from $ 23,675 to $ 4,776,156, so as to remove their pending breach of contract action from the New York Civil Court to the New York State [**2] Supreme Court.

Although, as plaintiffs correctly note, CPLR 3025(b) provides that leave to amend a complaint shall be freely granted, nevertheless, leave to amend should not be granted where, as here, the proposed amendment is plainly lacking in merit (Wieder v Skala 168 AD2d 355, 356, 563 N.Y.S.2d 76). In denying leave to amend plaintiffs' Civil Court complaint for breach of contract, the IAS court properly determined, based upon the record and documentary evidence, that the proposed amendment, seeking to allege that the defendant, a tax-exempt, non-profit religious institution, had discriminated against three year old Daniel, a child with a disability, in violation of the New York Human Rights Law (Executive Law @ 296[4]) by allegedly expelling the child from the defendant's nursery school, was devoid of merit and patently insufficient on its face.

Plaintiff Posner's own letters and pleadings reveal that his son, Daniel, frequently ran out of the nursery school classroom for no apparent reason, that the defendant had a legitimate reason, implemented as a school policy, for the classroom door to remain open, and that plaintiff Posner [**3] himself had voluntarily withdrawn Daniel from the nursery school, when the defendant refused to change its non-discriminatory policy.
Accordingly, plaintiff failed to establish any factual or legal basis for the proposed amended claim that the defendant had engaged in discriminatory conduct.

Nor did the IAS court abuse its discretion in denying leave to amend the ad damnum clause of the Civil Court complaint to increase from $ 23,675 to $ 4,776,175 the compensatory and consequential damages alleged on behalf of Daniel with respect to the plaintiffs' existing causes of action for breach of contract and proposed new multi-million dollar claims for discrimination, and in thereby refusing to remove the [*197] underlying action from the Civil Court to the Supreme Court, where the plaintiffs failed to make any evidentiary showing that their damages were more than originally claimed or could not be adequately compensated within the Civil Court's monetary jurisdiction (Matter of Schwartz v. New York City Transit Authority, 104 AD2d 370, 478 N.Y.S.2d 700, appeal dismissed 63 NY2d 914, 483 N.Y.S.2d 213, 472 N.E.2d 1041). [**4]

Finally, the IAS court properly imposed a monetary sanction of $ 100 in motion costs upon plaintiff Posner pursuant to 22 NYCRR part 130 since he abused his position and privileges as an attorney

by instituting the underlying vexatious litigation seeking to recover a $ 1,775 membership fee, which he thereafter escalated into a $ 12,000,000 Federal action when the defendant, for legitimate reasons, refused to yield to his demands (Picnic v. Seatrain Lines 189 AD2d 622, 592 N.Y.S.2d 346; lv denied 81 NY2d 709).

We have reviewed the plaintiffs' remaining claims and find them to be without merit.

ENTERED: March 17, 1994

APPENDIX F - ORDER OF THE NEW YORK STATE SUPREME COURT, NEW YORK COUNTY, FILED OCTOBER 15, 1993

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 19

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In the Matter of the Application
of Louis J. Posner, and Daniel
J. Posner, Plaintiffs, to Remove
to the Supreme Court of the State
of New York, County of New York,
an action now pending in the New
York City Civil Court entitled:

LOUIS J. POSNER and DANIEL J.
POSNER, a minor, by his parent
LOUIS J. POSNER,

Plaintiffs,

Index No. 109691/93
#142 of 5/18/93

-against -

CENTRAL SYNAGOGUE,
Defendant.

----------X

BURTON S. SHERMAN, J.:

Plaintiffs move pursuant to CPLR 325(a) & (b) and 3025(b) for an order transferring their action from the Civil Court to the Supreme Court and granting them leave to amend their complaint.

Defendant cross-moves pursuant to CPLR 3211(a)4 and 2201 for an order dismissing or staying plaintiffs' action on the ground that there is a federal action pending between the parties for the same relief plaintiffs seek herein.

Plaintiff, Louis Posner, is an attorney and the father of the infant plaintiff Daniel Posner ("Daniel"). Daniel, who according to his father was three years old when plaintiffs' action was commenced (December, 1992), started nursery school classes on September 21, 1992. He frequently ran out of the classroom and defendant requested that one of his parents remain in the hallway during class hours. On October 6 Daniel's mother sat outside the classroom. That was Daniel's last day in the nursery school. On October 8, 1992, Mr. Posner wrote to the director of the nursery school advising her that his wife, who had other commitments, would not serve as a "door guard" and that Daniel would not attend class unless and until defendant agreed to keep the classroom door closed, install a gate or post a guard at the door. On October 9, Mr. Posner wrote to defendant demanding that his annual synagogue membership dues of $ 1,175 be refunded stating that Daniel's "constructive expulsion" constituted a "breach of implied contract" with respect to his "membership agreement". The letter also stated that legal proceedings would be commenced without further notice if defendant adhered to its policy of not refunding membership

dues. On October 10. 1992, defendant refunded $ 3,100 of the $ 3,250 that had been paid for Daniel's tuition.

On December 10, 1992, Mr. Posner commenced a Civil Court action against defendant on behalf of himself and his son to recover his $ 1,175 membership fee. Thereafter, he amended his Civil Court complaint, as of right, to add claims for consequential damages of $ 22,500. Defendant served its answer in January 1993 asserting counterclaims for unjust enrichment and breach of contract. On January 28, Mr. Posner served notices to take the depositions of Daniel's nursery school teacher, the director of the nursery school and defendant's former administrative vice-president. The depositions notices were accompanied by three document requests that can be fairly characterized as extremely burdensome (see defendant's exhibit "6"). Defendant moved for a protective order and Mr. Posner cross-moved to compel discovery ("the Civil Court motions"). By separate motion, Mr. Posner moved for an order of preclusion contending that defendant's bill of particulars was defective. His motion was denied as untimely and he filed a notice of appeal to the Appellate Term.

On April 15, 1993, one business day prior to the April 19 return date of the Civil Court motions, Mr. Posner served a federal complaint on defendant which alleged inter alia that defendant deprived Daniel of his rights under the Education of the Handicapped Act (20 U.S.C. §§ 1401 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. §§ 701 et seq.) and the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. §§ 6000 et seq.) in violation of New York's Executive Law Sect. 296 and 42

U.S.C. § 1983. Mr. Posner's federal complaint seeks compensatory damages of $ 4,000,000 and punitive damages of $ 8,000,000. On April 19, 1993, the return date of the Civil Court motions, Mr. Posner served the instant motion to transfer his Civil Court action to this court and to amend the complaint. The proposed amended complaint alleges inter alia violation of the Human Rights Law (Executive Law Sect. 296[4] and seeks damages of $ 4,776,175.

Mr. Posner's thesis herein is that defendant violated Executive Law Sec. 296(4) by denying Daniel the use of its facilities because Daniel had a speech disability. His thesis is bereft of current or prospective support, as well as, common sense. Daniel was 3 years old. The nursery school has a policy of keeping the door to the classroom open so that the children could go to the bathroom, as well as see their parents in the hallway until it was determined that parental proximately was no longer necessary. It is undisputed that Daniel frequently ran out of the classroom. Mr. Posner wanted the classroom door closed. He did not get his way and as a result he withdrew Daniel from nursery school. The vexatious litigation he instituted thereafter is describe above. He started with a simple suit to recover his $ 1,775 membership fee which he escalated to a federal action for $ 12,000,000.

This court will not encourage Mr. Posner's further abuse of his position and privileges as an attorney.

Accordingly, plaintiffs' motion is denied. Plaintiffs' attorney is directed to pay motion costs of $ 100 to defendant's attorney

within 10 days of service of a copy of this order with notice of entry.

Defendant's cross-motion is denied as academic.

This constitutes the decision and order of the court.

Dated : OCT 12, 1993

J.S.C.

Filed Oct 15, 1993
County Clerk's Office
New York

APPENDIX G - ORDER OF THE NEW YORK STATE COURT OF APPEALS, FILED JUNE 16, 1994

Louis J. Posner, et al.,
Appellants,

v. Central Synagogue,
Respondent.

Mo. No. 503

COURT OF APPEALS OF NEW YORK

83 N.Y.2d 953; 639 N.E.2d 419; 1994 N.Y. LEXIS 1385; 615 N.Y.S.2d 878

June 16, 1994, Decided

NOTICE: [*1] THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE
PUBLICATION IN THE NEW YORK REPORTS.

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF
THE FINAL PUBLISHED VERSION.

OPINION:

Motion for leave to appeal dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

APPENDIX H - CENTRAL SYNAGOGUE NURSERY SCHOOL CONTRACT, SIGNED MARCH 31, 1992

Central Synagogue
Nursery School
123 East 55 Street
New York, NY 10023

NURSERY SCHOOL CONTRACT

I hereby enroll my child Daniel Jacob Posner, birth date 2/23, 1989 in the CENTRAL SYNAGOGUE NURSERY SCHOOL for the school year 1992, and ending May, 1993.

I agree to pay $5,200.00 for the school year. It is understood that the amount of the non-refundable deposit will be credited to the tuition fee. Payments are to be as follows: $750.00 non-refundable deposit herewith, $2500.00 on or before September 1, 1992, and the balance on or before December 31, 1992. The school session consists of 5 days per week: Monday-Friday 9:00-12:15.

I understand that this agreement is for the entire school year, unless written notice of withdrawal is received by the school prior to April 15, 1992. In such case my obligation to pay the above, less the non-refundable deposit, shall terminate. I also understand that I shall not be entitled to any reduction or refund for absence, illness or withdrawal.

If it is felt by the staff of the school, after due consideration, that the child is not benefiting from his Nursery School experience it is the privilege of the school to request that the child be withdrawn, and to refund the tuition for the remainder of the year.

I agree to abide by and to be bound by the rules and regulations of the school. This contract is entire and not divisible.

PARENT SIGNATURE Louis J. Posner
DATE: 3-31-92
ADDRESS 300 East 71st Street, Apt. 11-J
PHONE XXX-XXXX
New York, New York 10021

SIGNATURE FOR NURSERY SCHOOL_____

Days 5

Group 3's

APPENDIX I - LETTER FROM DEPARTMENT OF HEALTH TO NURSERY SCHOOL DATED JULY 6, 1993

THE CITY OF NEW YORK
DEPARTMENT OF HEALTH
BUREAU OF DAY CARE
Riverside Health Center
60 West 100 Street
New York, NY 10025

July 6, 1993

Ms. Livia Thompson, Executive Director
Central Synagogue Nursery School
123 E. 55th Street
New York, NY 10023

Dear Ms. Livia Thompson:

We are pleased to forward to the Central Synagogue Nursery School 123 E. 55th Street, New York, NY 10021 a two year permit issued by the Commissioner of Health. Permit #2285, dated April 05, 1993, is for 83, ages 2 to 6.

Issuance of this permit attests to your compliance with Title III, Articles 45, 47 and general and relevant sections of the New York City Health Code. Lack of compliance with the Code can result in permit revocation. As evidence of your authority to conduct a day

care service in New York City, the permit should be posted in a conspicuous place.

The Early Childhood Education Consultant assigned to your program is Mr. Royal Fisher. Please feel free to contact her at 212-280-9274 with questions and/or comments about the provision of day care services in New York City. Your consultant will visit your program to monitor Health Code compliance, as well as to offer technical assistance. The law requires Bureau staff to make unannounced visits in addition to those made by appointment.

Your cooperation in discussing with your Early Childhood Education Consultant any planned changes in your operation affecting Code compliance will be appreciated.

Best wishes for the continued success of your licensed program.

Sincerely yours,

Gwendolyn Wellington
Borough Manager
Manhattan/Bronx Unit

cc: Royal Fisher

APPENDIX J - REPORT FROM THE PARKSIDE SCHOOL FOR END OF YEAR COUNSELLING REPORT – JUNE, 1994

THE PARKSIDE SCHOOL
48 West 74th Street
New York, N.Y. 10023
(212) 721-8888

End of Year Counselling Report--June, 1994

Name: Daniel Posner

Date of Birth: 2/23/89

Period Covered: March -- June, 1994

Danny was referred for counselling services because his extreme anxiety was interfering with his adjustment to school. Changes of any kind in the classroom routine precipitated panic reactions in Danny. He monitored his teacher's proximity with unflagging vigilance, and became distressed whenever she was not immediately available. Danny's anxiety appeared related to, and exacerbated by, certain sensitivities. For example, he was acutely aware of noises; sounds which other children screened out were not only perceptible, but extremely disruptive to Danny. He also became overwhelmed when in a group larger than his class' usual

size--"Too many people," he tells his teachers, even now. Situations of conflict between children or even mild limit-setting by a teacher toward Danny also trigger responses of extreme anxiety. At these times, Danny may become tearful or withdrawn.

Danny has begun to use his relationships with his teacher and therapists to ground himself at Parkside and to begin to master some of the anxiety generated by his special sensitivities and regulatory difficulties. With Ms. Sharp's help, Danny developed a positive alliance with me in the play therapy room. Initially, he used our sessions to express concerns about changes and to try to construct a stronger sense of the constancy of people who are important to him. These remain salient themes for Danny; he is now also beginning to branch out into symbolic play as a means to express feelings and concerns. Danny's teachers and other therapists report that he is making significant gains in his use of language and in developing gratifying relationships with peers. Danny's mother reports that he is becoming more adaptive and more resilient at home and in new situations. Mrs. Posner's collateral work with me has been an important asset in my treatment of Danny.

Recommendations: Danny needs to continue in the small classroom environment at Parkside with intensive therapeutic support (speech and language, occupational therapy and counselling) in order to consolidate and build on the gains he has made thus far. Danny has made impressive strides in developing positive relationships with adults and peers, in strengthening his self-image and finding strategies to master anxiety. He continues to be vulnerable,

however, to disorganizing panic when confronted by "too many people", too much stimulation or intense affects which he does not yet understand or experience as safe. He continues to need supportive relationships with specialists who can help him make sense of new experiences, modulate anxiety and find his own means of negotiating interpersonal and cognitive challenges.

Anne Tuohy, CSW

No. 95-836

Supreme Court, U.S.
FILED
JAN 25 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL J. POSNER, a minor, by his parent, LOUIS J. POSNER,

Petitioner,

—against—

CENTRAL SYNAGOGUE, CENTRAL SYNAGOGUE NURSERY SCHOOL, and MARY SOLOW, as Director of Central Synagogue Nursery School,

Respondents,

—and—

THE UNITED STATES OF AMERICA,

Respondent-Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CENTRAL SYNAGOGUE

MARTIN R. GOLD
GOLD, FARRELL & MARKS
Counsel for Respondent Central Synagogue
41 Madison Avenue
New York, New York 10010
(212) 481-1700

Of Counsel:

MARTIN R. GOLD
ROBERT P. MULVEY

QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the collateral estoppel effect given by the federal courts to New York State court judgments finding that the departure of the attorney-petitioner's son from Central Synagogue Nursery School had nothing to do with any alleged "disability", but was the result of his father's refusal to abide by the school's written policy requiring parents to be available during the child's first days at nursery school?

2. Should this Court grant certiorari to determine whether the activities of a private nursery school in following its own internal policies constitute state action in the absence of any claim that the state dictated or influenced such policy, in a case where that issue would be ripe for review only if the collateral estoppel determination were reversed?

3. Should this Court grant certiorari to review the constitutionality of a statutory provision exempting religious organizations from the requirements of the Americans With Disabilities Act, in a case where that issue would be ripe for review only if the collateral estoppel determination were reversed?

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STATEMENT OF THE CASE

Petitioners, attorney, Louis J. Posner, and his son, Daniel, petition for certiorari from a judgment of the United States Court of Appeals for the Second Circuit which unanimously affirmed a judgment of the United States District Court for the Southern District of New York, granting respondents summary judgment dismissing the complaint.

This vindictive and frivolous lawsuit has been described by state and federal courts as "vexatious litigation", "bereft of current or prospective support, as well as, common sense" (A. 32)[1], "devoid of merit" (A. 26), an abuse of Mr. Posner's status and privileges as an attorney (A. 27, 32) and "conduct unbecoming a member of the bar" (A. 10). It was commenced in November 1992, after Mr. Posner withdrew his then three-year old son from nursery school following a mere ten days' attendance. The nursery school is a part of Central Synagogue, a Reform Jewish Congregation located in Manhattan. The Petition to this Court adds new misstatements of the facts and of the proceedings below.

A. Background Facts

Prior to the enrollment of their son in the nursery school, the Posners were sent a brochure which set forth the school's policy that parents were expected to remain at the school to help children adapt to first days at school and separation from parents. (A. 3).

During Daniel's first school days, he persistently left the class room for no apparent reason, so the school asked that a parent attend. On October 8, 1992, after Daniel's mother spent one day in the hallway outside of Daniel's classroom, Mr. Posner sent a hand-delivered letter stating that he needed his wife to help him in his law practice, and that she would no longer serve as a "door guard". (A. 3). He stated he was aware

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[1] References with the prefix (A. __) are to the Appendix accompanying the Petition For Certiorari.

that Daniel was "persistently leaving the class room" (A. 3), but cast blame on the school's policy of keeping the door open. Mr. Posner suggested that the nursery school should alter its policy and close or otherwise secure the door, despite the interests of other children who were experiencing separation problems and had parents available in the hallway in compliance with the policy. Mr. Posner stated he would not send Daniel back to school with a parent as the school had requested, and suggested the school "expel" Daniel and refund the tuition. (A. 3).[2]

On October 9, 1992, Mr. Posner wrote to demand a refund of his unrelated synagogue dues in the amount of $1,175, falsely claiming that membership in Central Synagogue was a condition precedent to his son's admission to the nursery school.

On or about October 14, 1992, Central Synagogue voluntarily refunded to Mr. Posner $3,100 of the $3,250 of Daniel's tuition, and forgave payment on the remaining balance of $1,950. (A. 4).

When Mr. Posner's demands for reimbursement of his synagogue dues were not met, he commenced an action in New York City Civil Court, seeking damages in the amount of $1,175. No claim based on handicap or discriminatory conduct was raised or suggested.

In January 1993, Mr. Posner wrote threatening to amend his Civil Court claim to seek additional damages unless his membership fee was refunded. Mr. Posner claimed that there were

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[2] Despite the ample record to the contrary, including his own correspondence, Mr. Posner now claims for the first time in this Petition that the door to the classroom was closed during the acclimation period, but that the nursery school thereafter advised his wife "that the door to the classroom would remain open and that she would have to sit alone on a chair in the hallway for 3 1/2 hours a day, 5 days a week, for the remainder of the school year." (Petition at 19). Petitioners do not cite to any portion of the Record for this revisionist, absurd and totally false statement of the case.

"substantial unasserted consequential damages" to his family and his practice of law. His letter advised that Central Synagogue "should be forewarned not to underestimate the substantial amount of time and expense this matter may entail." (A. 4). Again, nothing was said in this letter regarding any claim of discrimination based upon Daniel's "disability."

Mr. Posner thereafter amended the Civil Court complaint, alleging sweeping consequential damages of $22,500. Again, the amended complaint made no reference to any handicap his son might have had, or Central Synagogue's allegedly discriminatory conduct. (A. 4-5).

In March 1993, Mr. Posner wrote Central Synagogue to claim for the first time that Daniel was "handicapped" on the basis of a speech delay, and that this was the cause of his "exclusion" from the nursery school program. He threatened to remove the Civil Court case to New York State Supreme Court and to commence a federal action for compensatory and punitive damages. Mr. Posner threatened that "the cloak of religiosity" would not immunize Central Synagogue from a discrimination law suit. He added that he had observed a "pattern of discrimination" at the nursery school based on his observation that there were no minority students enrolled. He put respondents on notice that "juries in New York County are sympathetic to discrimination suits, are well represented by members of the Black and Hispanic communities, and are known for awarding substantial damages." (A. 5).

On or about March 16, 1993, Central Synagogue offered to refund Mr. Posner's membership fee. Mr. Posner responded by asking "whether [Central Synagogue] would be willing to reinstate Daniel without required parental attendance?" (A. 5). Central Synagogue advised Mr. Posner that it could not agree to his terms because all parents, not just the Posners, were required to stay with their children until the teacher determines that parental presence was no longer necessary. (A. 5).

On March 24, 1993, Mr. Posner rejected the "paltry" offer of $1,175 as "an insult" and again raised the specter of additional lawsuits, warning that "at some future date," he intended to commence actions seeking damages "in excess of One Million ($1,000,000) Dollars." (A. 5-6).

On April 15, 1993, plaintiffs commenced the present federal action, alleging that Central Synagogue failed to accommodate Daniel's speech delay, which he claimed is a disability within the meaning of The Education of the Handicapped Act, 20 U.S.C. §§ 1401 *et seq.*, The Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000 *et seq.*, and the Americans With Disabilities Act ("ADA"), all purportedly in violation of 42 U.S.C. § 1983. (A. 2-3). The complaint sought damages in excess of $12 million.

Mr. Posner then moved to remove the Civil Court action to New York State Supreme Court and to amend the state complaint to allege that Central Synagogue unlawfully discriminated in violation of the New York Human Rights Law when it allegedly expelled Daniel, a "handicapped" individual, from its nursery school. Central Synagogue cross-moved to dismiss plaintiffs' proposed amended complaint.

B. The New York Supreme Court's Decision and Order

On October 12, 1993, New York State Supreme Court Justice Burton Sherman denied Mr. Posner's motion to remove and amend his Civil Court action. The Court found, in relevant part, that "[Mr. Posner's] thesis . . . that defendant violated Executive Law § 296(4) by denying Daniel the use of its facilities because Daniel had a speech disability . . . . [was] bereft of current or prospective support, as well as, common sense." (A. 32). The Court went on to find the following dispositive facts:

> "Daniel was 3 years old. The nursery school has a policy of keeping the door to the classroom open so that the children could go to the bathroom, as well as see their parents in the hallway until it was determined that parental proximity was no longer necessary. It is undisputed that Daniel Posner frequently ran out of the classroom. Mr. Posner wanted the classroom door closed. He did not get his way and as a result he withdrew Daniel from nursery school. The vexatious litigation he instituted thereafter is described above. He started with a simple suit to recover his $1,775 [sic] membership fee which he escalated to a federal action for $12,000,000.00. This court will not encourage Mr. Posner's further abuse of his position and privileges as an attorney." (A. 32).

In response to this decision, Mr. Posner attacked the judge and opposing counsel. He frivolously and falsely claimed that they had colluded because counsel had obtained an unsigned copy of the court's decision. Even after counsel for respondents provided Mr. Posner with documentary proof that they had obtained the decision through a commercial lawyers' service, he pursued baseless charges against opposing counsel and Justice Sherman before disciplinary authorities. These charges were dismissed.[3]

C. The Decision And Order Of The Appellate Division, First Department

Mr. Posner then appealed to the Appellate Division, First Department, attacking Justice Sherman's opinion as: "judi-

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[3] The *New York Law Journal* published a front-page article quoting verbatim excerpts from Justice Sherman's opinion. Unrestrained by the First Amendment or the privilege for accurate reporting of judicial proceedings, Mr. Posner sued the *Law Journal* for defamation. *Louis J. Posner, Esq.* v. *The New York Law Journal Publishing Co., et al.*, Supreme Court, New York County, Index No. 94/130085. The court dismissed the action and imposed a $1,000 sanction against Mr. Posner.

cial[ly] insensitive" and "inane"; "mindless[ ]," "callous[ly] indifferen[t]", and referring to the decision as a "highly-biased, unsubstantiated, illogical and premature determination", a "reprehensible display of judicial ineptitude" containing a "one-sided account of the litigation practices by the parties" and the "outrageous accusation" that the discrimination claim is meritless.

He continued to advance his paranoid theories of collusion on appeal, alleging that Central Synagogue and/or its counsel "improperly influenced" the court below. His brief on that appeal stated:

> "one cannot ignore the fact that defendant Central Synagogue is an influential and powerful organization with far reaching tentacles, whose congregation includes several hundred attorneys, many of whom are partners in mid-size and large law firms in New York City."

The Appellate Division, First Department, unanimously affirmed Justice Sherman's decision, directed Mr. Posner to pay costs, and dismissed plaintiffs' claims of collusion and improper influence as being "without merit." *Posner* v. *Central Synagogue*, 202 A.D.2d 284, 609 N.Y.S.2d 195 (1st Dep't 1994). The Appellate Division, which reviews facts as well as law, found that Mr. Posner's proposed amended complaint, alleging discrimination, was "plainly lacking in merit." (A. 26). It stated:

> "In denying leave to amend plaintiffs' Civil Court complaint for breach of contract, the IAS court properly determined, based upon the record and documentary evidence, that the proposed amendment, seeking to allege that the defendant, a tax-exempt, non-profit religious institution, had discriminated against three year old Daniel, a child with a disability, in violation of the New York Human Rights Law (Executive Law § 296[4]) by allegedly expelling the child from the defendant's nurs-

> ery school, was devoid of merit and patently insufficient on its face." (A. 26).

With regard to the sanctions imposed upon Mr. Posner by Justice Sherman, the Appellate Division found that such sanctions were appropriate,

> "since he abused his position and privileges as an attorney by instituting the underlying vexatious litigation seeking to recover a $1,775 [sic] membership fee, which he thereafter escalated into a $12,000,000 Federal action when the defendant, for legitimate reasons, refused to yield to his demands." (A. 27-28).

Petitioners' motion for leave to appeal to the New York Court of Appeals was dismissed. *Posner* v. *Central Synagogue*, 83 N.Y.2d 953, 615 N.Y.S.2d 878 (1994). (A. 34).

D. The District Court Proceedings

Central Synagogue moved to dismiss the federal action pursuant to Rule 12(b)(6), Fed. R. Civ. P., and for sanctions pursuant to Rule 11, Fed. R. Civ. P. The district court, Hon. Leonard B. Sand, U.S.D.J., converted the motion to one for summary judgment. In his Memorandum of Law In Opposition, Mr. Posner resorted again to offensive rhetoric, claiming that Central Synagogue had "excluded" Daniel because the Synagogue and its members were, "such elitist snobs that they would rather be subject to a suit for unlawful discrimination, than to be 'tainted' with having a disabled child among their ranks." Mr. Posner then went on to make the outrageous claim that, "[i]n fact this air of exclusivity reeks of the same demented mentality as Nazis seeking a pure Aryan race."[4] In the same memorandum, Mr. Posner acknowledged

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[4] On this Petition, Posner similarly states that "In Manhattan's east side it is standard practice for preschools to discriminate against children with disabilities" (Petition at 14), as if such an outrageous allegation were a matter of which this Court might take judicial notice.

that he had sought removal of the state action and instituted the federal action, not because of any claim of discrimination, but because of Central Synagogue's "arrogance and intransigence" in failing to yield to his demands.

Recognizing that Central Synagogue was within the religious exemption of the ADA, Mr. Posner interposed a frivolous constitutional challenge to the exemption. This obligated Judge Sand to certify the matter to the United States Attorney General and afford the government an opportunity to intervene, which it did, filing a brief in support of the constitutionality of the religious exemption contained in the ADA.

On December 1, 1993, Mr. Posner served a sur-reply brief in which he continued his verbal assault and *ad hominem* remarks, claiming that Central Synagogue's attorney, who was expecting her first child, "has gone so far as to wag her pregnant belly before the Civil Court judge to request an extended adjournment."[5]

On September 19, 1994, Judge Sand applied full faith and credit to the state court determination, in accordance with 28 U.S.C. 1738, and granted defendants summary judgment on all claims.

> "The critical problem with Mr. Posner's action in this court is that two New York state courts have already found that the facts surrounding [Mr. Posner's] claim of discrimination against his son cause his claim to be completely meritless. These prior determinations preclude Mr. Posner from relitigating the discrimination question in this court." (A. 15).

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[5] In a similarly offensive vein, Mr. Posner was quoted, in a November 7, 1993 *New York Newsday* article regarding this litigation entitled "Dad Slams Closed-Door School Policy" as saying that Central Synagogue's counsel "[a]re the types of attorneys who know how to turn rape victims into sluts."

In reaching its determination, the district court searched the record in both state court proceedings and determined that:

> "In our view there is little doubt that the Supreme Court's denial of the motion to amend, as well as the appellate court's affirmance, amounted to a finding that, on the underlying facts, there was no merit to Mr. Posner's state law discrimination claim. It is also clear that Mr. Posner had a fair opportunity to address the merits of his discrimination claim to the state tribunals." (A. 18).

The district court held that based on these prior determinations, it was required to dismiss the claims.

> "Once we accord the state court findings the respect we must, Mr. Posner's federal claims cease to have any basis. All of Mr. Posner's federal claims—be they of constitutional or statutory dimension—depend, at the very least, on a connection between the nursery school's decision not to alter its long-standing 'open door' policy in Daniel's case, on the one hand, and Daniel's speech impairment, on the other hand. If no such connection existed, there could be no discrimination, however broadly or loosely that term is defined. Two New York courts have assessed the merits of Mr. Posner's claim that there was just such a connection; that is, that the defendants discriminated against Daniel because of Daniel's speech disability. Both courts found that the decision to remove Daniel from the nursery school was taken by Daniel's parents as a result of what may best be characterized as Mr. Posner's 'policy dispute' with the school regarding child-care management—a dispute having nothing whatsoever to do with the boy's handicap.
>
> "Simply put, there is no reason to believe that Mr. Posner could succeed on any of his federal claims consistently with the judgment of the New York courts that Daniel's speech disability had nothing to do with the

nursery school's insistence on its 'open door' policy."[6] (A. 19).

Mr. Posner's self-righteous statements in his Petition on behalf of the rights of handicapped children cannot camouflage the fact that this case does not involve any failure to provide access to the disabled, and that his son's alleged disability had nothing whatever to do with the nursery school's insistence on its "open door" policy. (A. 19).

E. The Decision Of the U.S. Court Of Appeals For the Second Circuit

By order and judgment, filed May 30, 1995 (A. 1-10), the Court of Appeals unanimously affirmed the district court's application of full faith and credit and grant of summary judgment, stating "it is abundantly clear that the New York courts would consider the foregoing proceedings to have conclusively resolved the discrimination issue." (A. 8). The Court of Appeals also ruled, in accordance with well settled law, that the activities of a private nursery school which is a part of a religious institution did not constitute state action necessary as a basis for Posner's § 1983 claims.

Although the Court of Appeals declined to assess costs or sanctions, it cautioned "Posner that his conduct is unbecoming of a member of the bar." (A. 10).[7]

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[6] Because Judge Sand ruled against him, Mr. Posner now also attacks him, accusing him of "acting as though he was counsel for Central Synagogue." (Petition at 31).

[7] Mr. Posner falsely claims that the U.S. Court of Appeals found a "nexus" between his son's disability and the school's policy of keeping the door open. Petition at 35. Such a conclusion would be at odds with the Court's holding. In fact, the Court of Appeals merely noted that Mr. Posner had asserted such a connection. (A. 3).

REASONS FOR DENYING THE WRIT

A. The Federal Courts Properly Applied Full Faith and Credit To The State Court Rulings

Federal courts are obligated to adhere to the requirement in 28 U.S.C. §1738 that they "give full faith and credit to state court judgments," *Kremer* v. *Chemical Const. Corp.* 456 U.S. 461, 475, 102 S. Ct. 1883, 1899 (1982), and must give the same preclusive effect to state court determinations as would be given by the state courts. *Milltex Industries Corp.* v. *Jacquard Lace Co. Ltd.*, 922 F.2d 164, 166 (2d Cir. 1991); *Winters* v. *Lavine*, 574 F.2d 46, 54-60 (2d Cir. 1978).

As the lower courts correctly held, the rulings by the New York State Supreme Court and the Appellate Division, First Department, were factual determinations that there was no merit to the claims of discrimination against defendants. (A. 18). These rulings were fatal to all of petitioners' federal claims. (A. 19).

As the Court of Appeals for the Second Circuit stated, under New York law, "the doctrine of collateral estoppel bars relitigation of an issue where that same issue has necessarily been decided in a prior action and where the party to be barred had a full and fair opportunity to contest the prior decision" (A. 18) (citing *Lanzano* v. *The City of New York*, 202 A.D.2d 378, 379, 609 N.Y.S.2d 891, 892 (1st Dep't), *leave to appeal denied*, 83 N.Y.2d 760, 616 N.Y.S.2d 14 (1994).

Whether a party had a full and fair opportunity to contest the earlier decision is determined by whether the party had adequate incentive to litigate "long and hard." *Winters* v. *Lavine*, *supra*, 574 F.2d at 58-59 n.14. As the Court of Appeals noted, "any doubt as to whether Mr. Posner knew that he was at a point in his litigation where he had to press the merits of his amendment was cured by the later appellate review of the Supreme Court's ruling" (A. 18), and under New

York law, the Appellate Division reviews findings of fact as well as legal determinations. N.Y. Civil Practice Law and Rules § 5501(c).

Mr. Posner's efforts to avoid the preclusive effect of the actions he initiated in the state courts are meritless. His claim that Central Synagogue did not raise collateral estoppel in a responsive pleading ignores the fact that Central Synagogue moved to dismiss instead of filing an answer, and that the district court converted the motion to a summary judgment motion. Posner was given explicit notice that the doctrine of collateral estoppel might be invoked by the district court, and he wrote a letter to the court arguing against its application. (A. 8-9).

Finally, Mr. Posner argues that the denial of a motion to amend should not be given collateral estoppel effect. Under controlling New York law, however, a decision to deny leave to amend a complaint may be a decision on the merits, *Wieder* v. *Skala*, 168 A.D.2d 355, 563 N.Y.S.2d 76 (1st Dep't 1990), and the decisions of the New York State Supreme Court and the Appellate Division in this case left no doubt that the motion was denied because of the meritless nature of petitioners' discrimination claims.

B. There Is No State Action Subject To This Court's Review

Apart from the preclusive effect of the "judgment of the New York courts that Daniel's speech disability had nothing to do with the nursery school's adherence to its 'open door' policy" (A. 19), petitioners' claims under 42 U.S.C. § 1983 fail because Central Synagogue's nursery school was not engaged in state action, under the tests applied by this Court. *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-05, 102 S. Ct. 2777, 2786 (1982).

As Mr. Posner acknowledges, the nursery school is "privately funded" (Petition at 28) and has no contract with the

state. (Petition at 30). Although Mr. Posner argues that the nursery school was licensed and regulated under state law, mere licensing and regulation are insufficient to impute state action where there is no nexus between the state regulation or licensing and the challenged action. *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 841, 102 S. Ct. 2764, 2771 (1982) (no state action where challenged activity was "not compelled or even influenced by state regulation"). Petitioners have not claimed, and cannot claim, that the nursery school's policy of leaving the classroom door open was an action that could be treated as one of the state itself.

As the Court of Appeals for the Second Circuit stated in rejecting Mr. Posner's § 1983 claims, there are "no cases . . . in which state action was found by a privately funded nursery school" (A. 9), and the cases relied upon by Mr. Posner (Petition at 30) are "factually inappropriate." Mr. Posner interprets this absence of authority as a basis for this Court's intervention, ignoring the more obvious lesson that the independent policies of private nursery schools simply do not constitute state action.

C. The Religious Exemption Contained In the ADA Is Constitutional

Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodation. Pursuant to section 307 of the ADA, "the provisions of [Title III] shall not apply . . . to religious organizations or entities controlled by religious organizations, including places of worship." 42 U.S.C. § 12187. Central Synagogue controls the operations of its nursery school, rendering the school statutorily exempt, even if petitioners had a valid claim of denial of reasonable access.

The constitutionality of a statute broadly exempting religious organizations from regulation is subject to the three-pronged test stated by the Court in *Lemon* v. *Kurtzman*, 403

U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "

As this Court held in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 335-36, 107 S. Ct. 2862, 2868 (1987), statutory exemptions for religious organizations from government regulation, such as that contained in the ADA, serve a valid secular purpose under the first prong of the *Lemon* test because they relieve religious organizations from the burden of predicting, under threat of liability, "which of its secular activities a secular court will consider religious."

Under the second prong of the *Lemon* test, the exemption in the ADA neither fosters, nor inhibits religion, but rather is the type of accommodation to religion that the Court has considered constitutionally permissible. *Lynch* v. *Donnelly*, 465 U.S. 668, 677-78, 104 S. Ct. 1355, 1361 (1984); *Walz* v. *Tax Commission*, 397 U.S. 664, 673, 90 S. Ct. 1409, 1413 (1970).

Finally, as this Court has repeatedly held, exemptions for religious bodies from generally applicable statutes do not entangle the government with religious entities, but rather promote separation of church and state. *Amos*, *supra*, 483 U.S. at 339; 107 S. Ct. 2862; *United States* v. *Lee*, 455 U.S. 252, 260 n.11, 102 S. Ct. 1051, 1057 n.11 (1982); *Gillette* v. *United States*, 401 U.S. 437, 91 S. Ct. 820 (1971).

Congress clearly acted within the Constitution and this Court's well-reasoned precedents in enacting the exemption.

CONCLUSION

This Court should deny the petition for certiorari, award respondent's double costs pursuant to Rule 43.7 of the Rules of this Court, and order such other relief as the Court deems appropriate.

Respectfully submitted,

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(4)

No. 95-836

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL J. POSNER, BY HIS PARENT,
LOUIS J. POSNER, PETITIONER

v.

CENTRAL SYNAGOGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Title III of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. 12181-12189 (Supp. V 1993), prohibits discrimination on the basis of disability in public accommodations, but exempts religious organizations from that prohibition. 42 U.S.C. 12187 (Supp. V 1993). The question presented is whether the exemption for religious organizations violates the Establishment Clause of the First Amendment.[1]

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[1] The United States intervened in this action for the sole purpose of defending the constitutionality of the exemption, and our participation in the lower courts was limited to addressing that issue. We therefore do not address the other questions raised by petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a10) is unpublished, but the decision is noted at 57 F.3d 1064 (Table). The opinion of the district court (Pet. App. 13a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1995. A petition for rehearing was denied on August 29, 1995. Pet. App. a23-a24. The petition for a writ of certiorari was filed on November 27, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September, 1992, petitioner Louis J. Posner enrolled his son Daniel in a nursery school operated by respondent Central Synagogue. Pet. App. a15. Respondent had a policy of keeping classroom doors open so that children having difficulty adjusting to school could have access to a parent outside the room. *Id.* at a3, a15. Daniel began leaving the nursery school classroom without permission, and, in accordance with school policy, his mother was asked to accompany him to school and to sit in the hallway outside his classroom. *Id.* at a3. After she did so for one day, petitioner wrote a letter to respondent, stating that his wife was needed in his law practice and asking that respondent deal with the problem in some other way. *Id.* at a3, a15. In the alternative, petitioner asked that respondent expel Daniel and refund his tuition. *Id.* at a3. Respondent chose the latter option. *Id.* at a4. When petitioner asked respondent to refund his synagogue dues as well, respondent refused. *Ibid.*

In November, 1992, petitioner initiated an action in New York Civil Court to recover $1175 in dues he had paid to respondent. Pet. App. a4. Petitioner later amended his complaint to add a claim for $22,500 in consequential damages. *Id.* at a4-a5. In March, 1993, petitioner asserted for the first time that respondent had discriminated against his son on the basis of a disability, and requested that respondent reinstate Daniel in school, without requiring either parent to attend. *Id.* at a5. At that point, respondent agreed to refund petitioner's dues, but refused to readmit

Daniel to its school under the terms proposed by petitioner. *Ibid.*

In April, 1993, petitioner filed an action in federal district court, alleging that his son's inability to remain in the classroom resulted from a language disorder and that respondent's failure to accommodate that disability violated the Education of the Handicapped Act, 20 U.S.C. 1401 *et seq.*; the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*; the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.*; and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101, *et seq.* Pet. App. a2-a3. Petitioner asserted a cause of action for those alleged violations under 42 U.S.C. 1983. Pet. App. a3. Petitioner also asserted a cause of action under the ADA. Govt C.A. Br. 4. As relief, petitioner sought four million dollars in compensatory damages and eight million dollars in punitive damages. Pet. App. a32.

In the same month, petitioner moved to transfer his state court case to New York State Supreme Court and to amend his complaint to allege that respondent had discriminated against Daniel on the basis of his disability, in violation of a state human rights law. Pet. App. a6. In October, 1993, the New York State Supreme Court denied petitioner's motion, finding his discrimination claim "bereft of current or prospective support, as well as, common sense." *Id.* at a32. The Appellate Division, First Department, affirmed, ruling that petitioner had "failed to establish any factual or legal basis for the proposed amended claim that the defendant had engaged in discriminatory conduct." *Id.* at a27. The New York Court of Appeals denied leave to appeal. *Id.* at a34.

Meanwhile, in the federal action, respondent moved for summary judgment, arguing, *inter alia*, that it fell within the ADA's exemption for religious organizations. Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodation, including privately owned nursery schools. 42 U.S.C. 12181(7)(J) (Supp. V 1993). Exempt from that prohibition, however, are "religious organizations or entities controlled by religious organizations, including places of worship." 42 U.S.C. 12187 (Supp. V 1993). Once respondent asserted the religious organization exemption, petitioner challenged the constitutionality of that exemption. In accordance with 28 U.S.C. 2403 and Fed. R. Civ. P. 24(c), the district court then certified to the Attorney General that the constitutionality of a federal statute had been placed in issue, and the United States intervened to defend the constitutionality of the exemption. Gov't C.A. Br. 6.

The district court granted respondent's motion for summary judgment, but without addressing the constitutionality of the religious organization exemption. Pet. App. a11-a20. It held that the state courts had found that respondent had not discriminated on the basis of disability and that the Full Faith and Credit Statute, 28 U.S.C. 1738, precluded relitigation of that issue in federal court. Pet App. a18-a20.

2. In an unpublished opinion, the court of appeals affirmed. Pet. App. a1-a10. The court held that 28 U.S.C. 1738 precludes the relitigation of issues resolved in prior state court proceedings, and it concluded that the prior state court proceedings in this case had "conclusively resolved the discrimination issue." Pet. App. a8.

ARGUMENT

Petitioner contends (Pet. 23-28) that the Court should grant certiorari to decide whether the religious organization exemption to the Americans with Disabilities Act of 1990, 42 U.S.C. 12187 (Supp. V 1993), violates the Establishment Clause of the First Amendment. Review on that issue is not warranted.

Both courts below determined that petitioner's claim of discrimination based on disability had been conclusively resolved against him in state court and that the Full Faith and Credit Statute, 28 U.S.C. 1738, precluded relitigation of that issue in federal court. See generally *Matsushita Electric Co.* v. *Epstein*, No. 94-1809 (Feb. 27, 1996). For that reason, neither court addressed the constitutionality of the religious organization exemption to the ADA. Because the courts below did not address that question, it is not properly presented here. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975).[2]

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[2] In *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987), this Court upheld the constitutionality of a provision exempting religious organizations from the prohibition against discrimination on the basis of religion contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1. The Court held that the exemption satisfied the three-part test set out in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), because it was rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions. 483 U.S. at 335-339. The Court rejected the contention that the exemption was overbroad because it reached secular as well as religious activities, reasoning that "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Id.* at 336. No court of appeals has ad-

CONCLUSION

The petition for a writ of certiorari should be denied as to Question 1.

Respectfully submitted.

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FEBRUARY 1996

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dressed the constitutionality of the religious organization exemption in the ADA.

FILED
MAR 18 1996
CLERK

(3)

No. 95-836

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

DANIEL J. POSNER, A MINOR,
BY HIS PARENT, LOUIS J. POSNER,

Petitioner,

-against-

CENTRAL SYNAGOGUE, CENTRAL SYNAGOGUE NURSERY SCHOOL, AND MARY SOLOW, AS DIRECTOR OF CENTRAL SYNAGOGUE NURSERY SCHOOL,

Respondents,

–and–

THE UNITED STATES OF AMERICA,

Respondent-Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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ON PETITION FOR WRIT OF CERTIORARI
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REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Petitioner Daniel J. Posner ("Daniel"), a minor by his father, Louis J. Posner, submits this reply brief to the brief for

the United States in opposition[1] and the brief in opposition of respondent Central Synagogue[2].[3] The Respondents fail to address the primary issue which is whether this case is appropriate for review by this Court. Instead, Respondent Central Synagogue engages in a vicious campaign of "mud slinging" and "character assassination" (Res. 3-8, 10) in complete contravention to Rule 24(6) of this Court which provides that a "brief shall be ... free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief which does not comply with this paragraph."

While respondents stridently argue that this case is completely lacking in merit, the reality is that the merits of this case are very strong. In most cases involving disability discrimination involving a child or student, the child is severely disabled and requires substantial accommodations from an institution which claims that its resources are already strained. The instant case is the most egregious example of disability discrimination, because it involves an intelligent, moderately disabled child who only requires minimal accommodation by a private, state licensed day care center that has substantial resources, but which refuses to accommodate the child because

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[1] References prefixed by "US" are to the brief for the United States in opposition.

[2] References prefixed by "Res." are to the brief in opposition of respondent Central Synagogue.

[3] Respondent Mary Solow, as Director of Central Synagogue Nursery School, did not submit a brief in Opposition. Solow is represented by Martin Klein, Esq., who is also the President of Central Synagogue.

of a long-standing policy of excluding all children with disabilities.

ARGUMENT

I. Petitioner Did Not Have A Full and Fair Opportunity to Litigate His Claims in State Court

The United States argues that petitioner's claim of discrimination based on disability had been conclusively resolved against petitioner in State Court and that the Full Faith and Credit Clause, 28 U.S.C. 1738 precludes relitigation of that issue in federal court (US 5); likewise, respondent Central Synagogue argues that the state courts made factual determinations that there was no merit to the claims of discrimination against defendants. (Res. 11-12). Both the United States and respondent fail to address that petitioner did not have a "full and fair opportunity" to litigate his claim and that the state courts applied a completely erroneous legal analysis for determining disability discrimination under the Americans with Disabilities Act of 1990 (the "ADA").

Respondent Central Synagogue admits "counsel had obtained an unsigned copy of the court's decision" and that "they had provided Mr. Posner with documentary proof that they obtained the decision through a commercial lawyers' service..." (Res. 5). This clear and unequivocal admission that the State Court provided an unsigned copy of a decision through formal channels to Respondent Central Synagogue's

counsel is a serious departure from the State Court's own procedures for issuing an official opinion of the Court. While federal Courts may be required to give collateral estoppel effect to an erroneous decision of a state court, the federal Courts should not be required to give collateral estoppel effect to a decision tainted with impropriety. Clearly, petitioner Daniel did not have a FAIR opportunity to litigate his claim in state court.

II. The State Court Determinations Even if Afforded Collateral Estoppel Effect Do Not Conclusively Determine the Discrimination Issue Because They Applied an Erroneous Legal Standard

The appropriate legal analysis for determining disability discrimination under the ADA for a pre-school child is set forth in Brandon Richard Roberts v. KinderCare Learning Centers, Inc., 896 F. Supp. 921 (Minn., 3rd Div. 1995). Brandon Richard Roberts ("Brandon") was a four year-old boy who "had an extremely limited vocabulary, did not play with toys, was developmentally delayed, suffered from seizures, was not toilet trained, was committing self-injurious acts, suffered from attention-deficit hyperactivity disorder [ADHD], and had a tendency to "bolt" or run away. Brandon was "disabled" within the meaning of the ADA" Brandon at 923. The district Court in Brandon noted that discrimination under the ADA constituted a failure to reasonably accommodate the disabled child, but noted that KinderCare was not required to reasonably accommodate Brandon if it could "demonstrate that taking such steps would fundamentally alter the nature of the ... service ... or accommodation being offered," or that the public

accommodation would have to endure an undue financial burden in order to provide its service to a disabled child. 42 U.S.C. § 12182(b)(2)(iii).

Under the Brandon analysis, the District Court ruled in favor of defendant KinderCare based on evidence and testimony submitted at trial and held that KinderCare had no duty under the ADA to provide the one-on-one care to Brandon required due to the severity of his disabilities because providing such care would fundamentally alter the nature of KinderCare's business, and would place an undue financial burden on KinderCare. The District Court in reaching its determination that the accommodations would fundamentally alter the nature of services provided, noted that KinderCare is in the group child care business and does not seek to provide individual child care. Under the undue burden test the District Court determined that KinderCare which operates "on a shoestring budget" would have to have a full-time care-giver to ensure one-on-one care for Brandon at a cost of $200 per week, plus benefits, as compared to the $105 per week in tuition received for Brandon's child. Brandon, at 926.[4]

The State Court decisions in which the federal courts claimed had collateral estoppel effect erroneously used a traditional "discriminatory intent" analysis appropriate for a discrimination case under Title VII of the Civil Rights Act of

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[4] Brandon's attorneys, Gray, Plant, Mooty, Mooty & Bennett, of Minneapolis, Minnesota, have appealed this case to the U.S. Court of Appeals for the Eighth Circuit. "Child Care and the ADA: Litigation Updates," Exceptional Parent, February 1996, vol. 26, Issue 2, Publ. Psy-Ed Corporation, by Maria Gil de Lamadrid, Esq., p. 42.

1964, 42 U.S.C. 2000e-1. Disability discrimination is fundamentally different than discrimination by reason of race, religion, or ethnic origin and the state court's ignorance in applying an erroneous legal standard should not be a basis for invoking collateral estoppel for discrimination by reason of disability.

Under the Brandon analysis, respondents have clearly and unequivocally discriminated against Daniel by reason of his disability. For Central Synagogue to have accommodated Daniel's disability by closing the door, installing a children's gate, or requiring its own personnel to safeguard the open door would not have fundamentally altered the nature of services provided by Central Synagogue Nursery School or have caused an undue financial burden to Nursery School.

Nursery School, as a day care provider, has a duty to ensure the health, safety and welfare of children under its care. Restricting access from the classroom for children at age three relates to the nature of these services provided and it is the universally accepted practice of day care centers across the country to keep the classroom door closed or to implement other reasonable methods of restricting ingress and egress to the classroom. A request to restrict access to and from a classroom due to reasonable heightened concerns for the safety of a disabled child with a neurologically based receptive and expressive communication disorder and co-existing attentional deficit hyperactivity disorder (ADHD) does not in any way, shape, or form fundamentally change the nature of the services provided by a state licensed day care center.

Under the second prong of the Brandon analysis, the accommodations for Daniel's disabilities does not impose an undue financial burden on Nursery School which charges $5,200 for a half-day of tuition, as compared to the $25 cost for the purchase of a children's gate for the classroom door. Nursery School, located on Manhattan's East Side between Park Avenue and Sutton Place, provides care to children from Manhattan's affluent community and can well afford the $25.

CONCLUSION

For all the foregoing reasons, this Court should grant the petition for a writ of certiorari and, upon review, should reverse the Judgment of the Second Circuit affirming the opinion and order of the District Court granting Summary Judgment in favor of the defendants and dismissing the complaint.

Respectfully Submitted,

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